Supreme Court, U. S.
FILED
JUN 20 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976

No. .....

76-1810

CITY OF LOS ANGELES, DEPARTMENT OF WATER AND POWER, a body corporate and politic; MEMBERS OF THE BOARD OF WATER AND POWER COMMISSIONERS OF THE DEPARTMENT OF WATER AND POWER, CITY OF LOS ANGELES; MEMBERS OF THE BOARD OF ADMINISTRATION OF THE DEPARTMENT OF WATER AND POWER EMPLOYEES' RETIREMENT, DISABILITY AND DEATH BENEFIT INSURANCE PLAN; HENRY G. BODKIN, JR.; KATHERINE B. DUNLAP; BURTON J. GINDLER; MICHAEL GLAZER; HERBERT C. WARD; LOUIS J. WEIDNER, JR.; RALPH E. POWELL; LEO W. SUDMEIER, JR.; WILLIAM D. SACHAU; and ROBERT V. PHILLIPS,

Petitioners,

vs.

MARIE MANHART, CAROLYN MAYSHACK, MARGERIE STOOP, ALICE F. MULLER and ETHEL L. LEHMAN, individually and on behalf of all other persons similarly situated; COMMITTEE TO PROTECT WOMEN'S RETIREMENT BENEFITS; and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 18,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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MARIE MANHART, CAROLYN MAYSHACK, MARGERIE STOOP, ALICE F. MULLER and ETHEL L. LEHMAN, individually and on behalf of all other persons similarly situated; COMMITTEE TO PROTECT WOMEN'S RETIREMENT BENEFITS; and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 18,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this action on November 23, 1976, as to which rehearing was denied, with dissenting opinion, on April 18, 1977. That decision affirmed the granting of summary judgment by the United States District Court for the

Central District of California in favor of respondent plaintiffs on a cause of action alleged under Title VII of the Civil Rights Act of 1964, as amended in 1972 [42 U.S.C. §2000e *et seq.*].

The first opinion of the Court of Appeals preceded by just two weeks the decision of this honorable Court in *General Electric Co. v. Gilbert*, ... U.S. ...., 50 L.Ed.2d 343, 97 S.Ct. ...., 45 USLW 4031 (1976). The Court of Appeals rejected the legislative history that this honorable Court expressly relied on in *General Electric*. Such legislative history would directly control this case even if *General Electric* had not been decided. Petitioners filed for a rehearing on the day the *General Electric* decision was announced. A divided Court of Appeals denied rehearing. Judge John F. Kilkenny, dissenting, stated in part:

> "I am convinced that the legal principles enunciated in *General Electric Co. v. Gilbert*, ... U.S. .... (Dec. 7, 1976), are here controlling and that the district court erred in granting a summary judgment against the appellants. At a minimum, the court should have conducted a trial on the issue of whether the appellants' retirement plan was justified on the basis of recognized actuarial tables showing the difference in longevity between males and females." (App. D-4.)[1]

Citations to Opinions Below.

The findings and conclusions on summary judgment and opinion on the injunction of the United States

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[1]Citations to "App. A-1, B-1, C-1" etc., are to pages of the Appendices to this Petition.

District Court for the Central District of California reported at 387 F.Supp. 980, are printed as Appendix B. The opinion of the United States Court of Appeals for the Ninth Circuit (not yet officially reported) affirming the judgment of the District Court, is printed as Appendix C. The opinion of the Court of Appeals denying rehearing, with dissenting opinion, is printed as Appendix D.

Jurisdiction.

The judgment of the Court of Appeals for the Ninth Circuit was entered on November 23, 1976, and amended December 23, 1976. Petitioners' timely petition for rehearing was denied on April 18, 1977.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Questions Presented.

1. Where females receive the same monthly pension benefits as do males, but for longer life expectancies than males, do Title VII and the Equal Pay Act prohibit different pension plan contributions for females and males?

2. In deciding the above question, did the Court of Appeals properly follow the opinion of the Supreme Court in *General Electric Co. v. Gilbert*?

3. May the lower courts adopt a rule of law requiring a municipal employer to pay higher compensation to females than m[illegible] in view of the jurisdictional limitations of Title VII, t[illegible]qual Pay Act, and Article III and the 10th, 11th [illegible] 14th [illegible]endments of the United States Constitution?

Statutes and Rules Involved.

Involved herein are Section 3 of the Equal Pay Act of 1963 (Pub. L. 88-38, 77 Stat. 56), 29 U.S.C. §206(d)(1); and Sections 703(a)(e)(h) and 706(g) of Title VII of the Civil Rights Act of 1964, as amended in 1972 (the Equal Employment Opportunity Act of 1972), 42 U.S.C. §2000e-2(a), (e), (h) and §2000e-5(g), the texts of which are printed in Appendix A hereto. A summary of legislative history of the Equal Pay Act, Title VII and the 1972 amendments is printed in Appendix E. The Charter of the City of Los Angeles, a state law, §220.1(1)(a)(g) is printed as Appendix F.

Statement of the Case.

This case was brought under Title VII of the Civil Rights Act as amended in 1972 (hereafter "Title VII"), claiming a violation of Section 703 of the Act (42 U.S.C. §2000e-2).

Plaintiffs are civil service employees of the City of Los Angeles Department of Water and Power and as such are members of a compulsory retirement Plan of such City Department (hereafter referred to respectively as the "Plan" and the "Department").

The Plan provides for several kinds of pension benefits at the employee's option. The most common is a "formula pension". Such formula is a monthly payment equal to 2% of average monthly salary paid during the last year of employment times the number of years of employment. This monthly benefit is guaranteed for life. It is a vested right of the employee.

Because women outlive men, the total amount paid as pension to a woman is greater than that paid to a man.

For clarity, this Plan should be contrasted with those pension systems which pay men and women the same *total* pension benefits during their respective life spans, but pay women smaller monthly pension amounts. See, *e.g., Henderson v. Oregon,* 405 F.Supp. 1275 (1975), on appeal in the Ninth Circuit.

The two systems may be analogized to loaves of bread accrued at the date of retirement. In the *Henderson* system, women receive the same size loaf as men but because the life expectancy is longer, the monthly "slices" received by a woman are smaller than those received by a man. In contrast, under the Department's Plan, women are to receive the same size "slice" of bread each month after retirement but because they live longer they must have a longer loaf in order to pay all the "slices".

To fund the Plan, the employees and the Department contribute thereto. To fund the "longer loaf" payable to females, higher contributions are necessarily required for women than for men. Although contributions made by the women themselves were *slightly* higher than the contributions made by men, the Department also contributed disproportionately more for women than for men.

Further, since each employee has an absolute right to the return of all his or her contributions, plus a vested pension right, the present worth of all compen-

sation paid to female employees is higher than the present worth of all compensation paid to male employees.

The following table shows an example of the present value at age 30 of pension benefits of a male and a female; and the present value of contributions necessary to fund a formula pension for each, retirement being at age 65.

	Male	*Female*
1. Age hire	30	30
2. Monthly salary during career	$1,000	$1,000
3. Monthly allowance at 65	700	700
4. Present Value of Pension discounted at 5½% interest and 1951 GA Mortality Table:	9,257	11,886
5. Monthly employee contribution to Plan	22.20 (x 1.1484=	25.49
6. Department's 110% monthly matching contribution	24.42	28.04
7. Present value (at age 30) of contributions to fund above pension at 5½% and 1951 table:		
a) Member Contribution	4,069	4,743
b) Department's 110% matching	4,476	5,217
c) Additional Department contribution	712	1,926
d) Total Department contribution	5,188	7,143

The contributions by the Department for a woman employee were always greater than for a corresponding man. The total amount of compensation for a woman was greater than for a corresponding man.

The plaintiffs herein contended in the trial court that differential contributions by men and women were *per se* illegal. The trial court erroneously held that even *rational* differentiation was illegal if related to sex:

"In short, under the Equal Employment Opportunity Act of 1972, all stereotypic treatment of persons based on . . . sex whether *rational or irrational* is dead."

(Emphasis added) (App. B-7) (This Court has never held that gender-based differentiations are *per se* illegal.)[2]

The District Court enjoined requiring larger contributions from females and ordered payment of prior "excess contributions" with interest to be paid to plaintiffs forthwith. The effect of this decision is to require a City to compensate its female civil service employees at an even higher rate than males.

Your petitioners appealed contending that by relying on a 1972 EEOC "guideline" as if it were a regulation, the trial court failed to exercise its explicit statutory responsibility to impartially and independently interpret the law *de novo,* and that in all events the "guideline" was contrary to Title VII and the Equal Pay Act. Your petitioners contended that they had committed no unlawful employment practice and that the decision penalized the employer and discriminated against men, by requiring the employer to compensate women at a higher rate than men.[3]

Similarly, to attempt to lump males and females together as in a so-called "unisex table" would necessarily result in males' contributions subsidizing the females'

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[2]*Kahn v. Shevin,* 416 U.S. 351, 40 L.Ed.2d 189, 94 S. Ct. 1734 (1974); *Stanton v. Stanton,* 421 U.S. 7, 95 S.Ct. 1373, 1377 (1975); *Geduldig v. Aiello,* 417 U.S. 484, 495, 41 L.Ed.2d 256, 94 S.Ct. 2485 (1974); *Craig v. Boren,* ..... U.S. ....., 50 L.Ed.2d 397 (December 20, 1976); *Califano v. Goldfarb,* ..... U.S. ....., 45 USLW 4237 (March 2, 1977).

[3]The Equal Pay explicitly prohibits this. "[A]n employer who is paying a wage rate differential in violation of this subsection shall *not,* in order to comply with the provisions of this subsection, reduce the wage rate of any employee." [29 U.S.C. §206(d)(1), Appendix A-1.] (Emphasis added.) To raise the "wage rate" as to women generally, "reduces" the wage rate as to men by comparison. See *Corning Glass Works v. Brennan,* 417 U.S. 188, 207, 41 L.Ed.2d 1, 17, 94 S.Ct. 2223 (1974).

benefits, and would consequently discriminate against males (see footnote 4, Court of Appeals Dissent, App. D-13). It's like having men and women *appear* to contribute to equal size "loaves" but then taking part of the loaf of the shorter-living men, to pay "slices" to the longer-living women.

The Court of Appeals repeated the errors of the trial court. Even when the *General Electric* opinion was issued, a majority failed to recognize those errors.[4] Such ruling undermines this Honorable Court's authority and nullifies its holding and reasoning in *General Electric Co.* It interferes with sovereign authority, and establishes an erroneous nationwide precedent for pension, annuity and insurance plans, mandating discrimination against males, and preferential compensation for females.

Additionally, the holdings of the lower courts confer on the agencies lawmaking powers that Congress specifically determined *not* to grant, which Congress specifically intended the agencies not exercise, and which this Court in *General Electric* said the agencies did not have. Your petitioners were thereby effectively deprived of an impartial *de novo* determination of issues of law and fact, which Congress specifically intended your petitioners be afforded by *independent* determination of the courts.

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[4]We believe footnotes 17 and 18 (*General Electric, supra,* 50 L.Ed.2d 343, 356-357) specifically demonstrate the error of the Court below and met the precise issues raised by this case.

REASONS FOR GRANTING THE WRIT.

I. The Court of Appeals Decided This Federal Question in Direct Conflict With the Supreme Court's Decision in General Electric Co. v. Gilbert.

In its initial opinion, the Court of Appeals took a position which was to prove directly contrary to the Supreme Court in *General Electric Co. v. Gilbert,* 1976, ... U.S. ....., 50 L.Ed.2d 343. Then, when the *General Electric* case came down two weeks later, the majority of the Court of Appeals refused to follow it.

The majority's decision below is directly contrary to the Supreme Court in the following particulars:

1. It fails to follow the will of Congress as to pay differentials as found by the Supreme Court in *General Electric.*

2. It results in the court below abdicating its responsibility to render impartial *de novo* judgment by improperly deferring to administrative interpretations of the Equal Employment Opportunity Commission (hereinafter "EEOC") which were rejected by the Supreme Court in *General Electric.*

3. It departs from the long standing meaning of "discrimination" in the Constitutional sense. The Supreme Court in *General Electric* rightly indicated it was not the intent of Congress to depart from that meaning in adopting the "sex" provisions of Title VII. (*General Electric, supra,* ..... U.S. ....., 50 L.Ed.2d 343, 356-357, fn 18, and 360.)

4. It fails to permit the use of actuarial tables to afford equality of treatment in employment under a city's benefit plan, which the Supreme Court in

General Electric indicated was permissible so long as not a mere pretext to effect invidious discrimination. (*General Electric, supra,* ..... U.S. ....., 50 L.Ed.2d 343, 351 and 355-356.)

A. The Will of Congress on Pay Differentials.

Congress never intended to prohibit the payment of different compensation to males and females when that differential was for a factor other than sex, even though the factor might be directly correlated with sex.

The Court recognized this in *General Electric,* ..... U.S. ....., 50 L.Ed.2d 343, 358-359) when it determined that the Bennett Amendment to Title VII [§703(h) of the Civil Rights Act, 42 U.S.C. §2000e-2 (h)] permitted denial of disability benefits for pregnancy, a condition correlated with a sex classification. But even if this Court had not reached that conclusion, the legislation requires it.

"Differentiation upon the basis of sex" is not *ipso facto* unlawful. The Bennett Amendment to Title VII provides that it shall *not* be an unlawful employment practice for an employer to "differentiate upon the basis of sex" for purposes of employee compensation "if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act" [42 U.S.C. §2000e-2(h)].

Such Section 6(d) was added to the Fair Labor Standards Act by the Equal Pay Act of 1963 (77 Stat. 56). Section 6(d) provides that employers may not discriminate between employees in compensation on the basis of sex "*except* where such payment is pursuant to (1) a seniority system (2) a merit system (3) a system which measures earnings by quantity or

quality of production, or (iv) a differential *based on any other factor other than sex*" [29 U.S.C. §206(d)(1)] (Emphasis added).

It is the payment differential based on an "other factor other than sex" which Congress thus inserted in both Acts to allow differences in compensation for factors such as pension payment or pension cost differentials based on different longevity. (See Dissent Op. at App. D-4.)

The pertinent legislative history of the Equal Pay Act and Title VII is detailed in Appendix E, and summarized below.

1. *Equal Pay Act.* In enacting the Equal Pay Act, The 88th Congress specifically intended that employers might continue to differentiate upon the basis of sex for compensation purposes so long as the classification involved actual or good faith differences as the basis for the differences in pay and was not a mere subterfuge to pay women less. The concept was equal pay for equal work. The House Committee noted, for example, that an employer might pay male packagers and female packagers differently where there were real and not merely nominal differences as the basis for the different pay. If the male packagers were required to lift heavy boxes and the female packagers were not, more compensation might be paid to the male packagers. Previous cases have so understood the Equal Pay Act. *Schultz v. Wheaton Glass Co.,* 421 F.2d 259 (3d Cir. 1970) *cert. den.* 398 U.S. 905; *Ammons v. Zia Co.,* 448 F.2d 116 (10th Cir. 1971).

Congress also specifically intended that the employer would not be required to classify men and women

in the *same* way if to do so would penalize the employer by requiring direct or indirect payment of more for work done by one class ("women") than for the same work done by the other class ("men"). (App. E-1.)

The House Committee rejected the administration's bill which would have prohibited differentiation on the basis of sex.

To ensure the result it intended, the House adopted statutory exceptions which were to be not merely "defenses" but were rather "exemptions from the operation of the statute." (App. E-1, 2.) The Committee Report stated that it was only prohibiting those pay differentials that were based *solely* on sex, and that it had provided the three specific exceptions and one broad general exception to operate as "exemptions" from the Act. Thus, the broad general exception for "any other factor other than sex" was meant to permit classification by sex for purposes of different compensation if there were some other factor other than sex (*e.g.*, lifting heavy packages as opposed to light packages or differences in other costs in employing women), that was the basis of the pay differential.

The controlling legislative history demonstrates it was not the intent of Congress to require the employer to pay women more than men, but only to prohibit paying women less when there was no rational basis for the differential. Longevity and the cost of funding for it was an "other factor" specifically recognized by both houses. (App. E-4 fn.2.)

The Senate history shows the same intent. The Senate Committee bill provided only the broad exclusion in its bill. Its report stated that the broad exception would

be allowed not only in the specific cases the Committee mentioned but also where "an employer will be economically penalized by the elimination of a wage differential." The House history shows the House likewise intended such as part of the broad exception (App. E-3, 4.) The Senate adopted the House bill as better expressing its intent. (App. E-5.)

2. *Title VII.* In enacting Title VII, the same 88th Congress always intended to legislatively treat discrimination on account of "sex" differently than discrimination on account of "race or color." After it was proposed to add "sex" to the bill in the House, the one serious argument advanced in favor of such amendment was that the Amendment was necessary to ensure the "color-blind" impact of the law among *women* in the labor market. After the "sex" amendment was passed, the House then added "sex" as a bona fide occupational qualification (without objection of any member). In contrast the House explicitly rejected an amendment to make "race or color" a bona fide occupational qualification. (App. E-6.)

When the House Bill (HR 7152) reached the Senate, questions were raised by Senator Dirksen and others as to the possible conflict with the Equal Pay Act.

Interpretive Memoranda[5] were introduced to the effect that classification by sex "where there is a rational basis" was *not* prohibited; and further that the standards of the Equal Pay Act would be applicable even under Title VII of the House Bill. (App. E-8.) This interpretation was given as to the House Bill, *before* Senate amendments enacted these points into express law.

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[5]This Honorable Court also relied on such Memoranda in *International Brotherhood of Teamsters v. United States, et al.*, ... U.S. ....., 45 L.W. 4506, 4513 (May 31, 1977).

An amendment in the nature of a substitute bill (Amendment No. 1052) was then introduced by Senators Dirksen, Humphrey, *et al.* It provided that *three* of the Equal Pay Act exceptions would also be exceptions to the Title VII prohibitions—differentials based on a good faith merit system, quantity and quality of work or seniority system. (42 U.S.C. §2000e-(h); A-3; 29 U.S.C. §206(a)(1); App. E-8).

The *fourth* exception of the Equal Pay Act and its general policy were expressly adopted by the Bennett Amendment. The manner in which the amendment was adopted demonstrates the intent.

Prior to the introduction of the Dirksen-Humphrey substitute, Senator Bennett proposed to amend the pending House Bill. Thereafter, both Senator Dirksen and Senator Humphrey expressly accepted the Bennett proposal as an amendment to *their* proposal in the nature of a substitute bill. All three Senators explained the effect of so accepting the Bennett Amendment. Senator Dirksen explained that the pending amendment recognized those exceptions that were carried in the earlier Act. (App. E-9.)

The Senate then voted to substitute the language of the Humphrey-Dirksen bill (as amended by the Bennett Amendment) for the language of the House bill. Such bill was then the pending business and subject to amendment.[6]

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[6]Proper procedure requires of course that an amendment in the nature of a substitute be voted on "twice". "Even if the [amending] paragraph constitutes the entire resolution and the motion to substitute is adopted, it is necessary then to vote on adopting the resolution as amended since it has only been voted to substitute one paragraph for another." Roberts' Rules of Order (rev. ed.), p. 142. This procedure protects the right of an individual to vote in favor of substituting the language of proposal "B" in preference to proposal "A", and then to vote against enacting "B" as law.

Senator Humphrey was specifically asked about the impact of the pending bill on retirement systems. Senator Randolph, who asked the question, had been co-author of the Senate subcommittee's equal pay bill. Senator Humphrey was the floor manager of the pending civil rights bill and had introduced the Senate Committee equal pay bill on the Senate floor. He also had expressly accepted the Bennett Amendment to clarify the intent of the Humphrey-Dirksen bill. In answer to Senator Randolph's question Senator Humphrey said that accepting the Bennett Amendment made it unmistakably clear that "*differences of treatment in industrial benefit plans,* including earlier retirement options for women, may continue in operation under this bill if it becomes law." (Emphasis added.) (See *General Electric, supra,* 50 L.Ed.2d 343, 359.)

The House thereafter adopted the Senate bill. In so doing it specifically affirmed this intent. (App. E-10, 11.)

When we set forth to the Court below the intent of the law as expressed by Senator Humphrey, the Court improperly rejected it as an "erroneous interpretation". (App. C-17, 18.) After this Honorable Court relied on Senator Humphrey's views as expressing the intent of the law (*General Electric, supra,* 50 L.Ed.2d 343, 359) the Court of Appeals still failed to follow that intent. Thus, while both Congress and the Supreme Court had indicated the proper administration of the Bennett Amendment and the specific legislative intent, the Court of Appeals ignored them both.

Its rationale on rehearing was the *further* erroneous conclusion of law that this Honorable Court in the *General Electric* case did *not* exercise its impartial judgment on legislative intent but relied "more heavily" on "finding" a conflict between interpretations of the Wage and Hour Administrator and the EEOC, and therefore deferred to the Wage and Hour Administrator instead of the EEOC to decide *General Electric*. Such rationale besides being incorrect, was also an egregious error of law as to the Courts' responsibility and the effect to be given administrative interpretations.

While this Honorable Court in *General Electric* recognized the conflicts, the majority below chose to find no conflict. (Compare the comments of the Dissent noting clear conflicts among the agencies and internal inconsistency within the rulings of the EEOC, App. D-7, 8). Although legislative intent was clear the lower courts "deferred" completely to a contrary administrative "interpretation".

What the majority below ignored was the fact that this Honorable Court exercised its independent, impartial judgment as to legislative intent and found that the Bennett Amendment allowed pay differentials for an "other factor other than sex" although the factor was correlated with sex, *e.g.*, pregnancy. In support of that position, this Honorable Court recognized that "longevity" was another "other factor other than sex" which could be the basis for differential compensation and *was already accepted as such* by the Wage and Hour Administrator of the Department of Labor. 29 CFR §800.116(d) (1975). (General Electric, *supra*, 50 L.Ed.2d 343, 359; see Dissent at D-7.)

The lower courts refused to accept 29 CFR §800.116 (d) (1975) as administrative recognition of sex-correlated longevity as a factor other than sex allowing pay differentials.

Yet, until this case, *everyone* has understood the administrative bulletin to mean that longevity was an "other factor other than sex" which would warrant pay differentials by the employer.

For example, as recently as 1975 the Secretary of Health, Education and Welfare said:

> "Accordingly [the Secretary] continues to follow the Executive Order regulations in requiring that fringe benefit plans provide *either* equal periodic benefits to members of each sex *or* equal contributions by the employer for members of each sex. . . ." (vol. 40 Fed. Reg. p. 24135, June 4, 1975) (emphasis added). (See also similar ruling by Office of Federal Contract Compliance, 41 CFR §60-20.3(c) (1970).)

Given greater female longevity it is impossible to have *equal* periodic benefits unless either the females or the employer or both contribute more for females, or the males subsidize the females. These rulings thus implicitly recognize the fact that longevity is a factor other than sex for which differential compensation may be paid to the sexes.

Congress enactment of the Pension Reform Act also recognizes this fact. (See p. 26 *infra.*) For the Court of Appeals to refuse to recognize longevity as an "other factor other than sex" and to rule that a pay differential based thereon is prohibited is a failure to give effect to the law as enacted by the Congress, and as interpreted by this Court in *General Electric*.

B. Will of Congress on Administrative Interpretations.

In its original opinion the Court of Appeals *also* found conflicts among administrative interpretations.

(App. C-19.) In its subsequent opinion the majority could "find" no inconsistency. (App. D-3.) Thus the holding of the latter decision seems to be that lower courts may use fluctuating and conflicting interpretations of administrative interpretations as the basis for rejecting both the decision of this Honorable Court and explicit Congressional intent in enacting the law.

Such view is contrary to this Court's holding in *General Electric,*—that the courts shall independently and impartially construe the statute. It is also contrary to specific legislative intent to the same effect, which intent would be controlling even if *General Electric* had not been decided. Further the *content* of the specific administrative interpretation relied on in the *second* Court of Appeals' decision contradicts the statutory language and explicit legislative history. Finally, in giving effect to one of the conflicting administrative interpretations in order to hold *against* the defendant, the Court of Appeals gave an effect thereto directly *opposite* to Congressional intent, as to the effect to be given *any* administrative intrepretation.

In enacting the Equal Pay Action, the 88th Congress was well aware of the *Skidmore* decision construing the Fair Labor Standards Act. (*Skidmore, et al. v. Swift & Co.,* 323 U.S. 134 (1944); See App. E-12-13.) In view of that decision, Congress acted specifically to ensure that administrative interpretations not be given the status of "interpretive regulations" and not be used *against* the defendant. They are not to be used as a substitute for the court's impartial judgment on matters of law or on matters of fact. One basic reason for so limiting the administrator was to ensure that the will of Congress as expressed in the statute

be given effect, and that any broader interpretations by a partisan administrator not be substituted therefor. (App. E-13.)

In considering legislative intent it is as important to see what Congress rejected as what it enacted.

In the 88th Congress, the equal pay bill proffered by the Administration would have given the administrator authority to issue "legislative regulations". Congress determined not to give either that authority *or* the authority to issue "interpretive regulations". Congress expressly limited his authority to interpretative bulletins, which "have no other significance, except that *if an employer relies on this interpretative bulletin, he is protected.* He is not in violation if he has done something in reliance upon those interpretative bulletins . . ." (App. E-13.) (Emphasis added.)

Under the Equal Pay Act, the Secretary is a prosecutor. As a Prosecutor, the Secretary has inherent authority to inform the public what cases he will prosecute, and Congress expressly recognized that *inherent* authority. However Congress specifically intended that the Secretary's interpretations could be used in court only as a shield by the defendant, and not as a policy-making sword in the hands of the administration (App. E-13.)

It is well established that the weight (if any) "to be given to interpretative rule varies with its statutory and administrative context. . . ." *United States v. Stapf,* 375 U.S. 118, 127 n. 11, 84 S.Ct. 248, 255, 11 L.Ed.2d 195 (1963). And here Congress intended that bulletins be given no weight in the scales of justice *against* a defendant, but only in defendant's favor.

It is significant that in 13 years under the Act, no employer so far as we know, has been prosecuted either for paying different pension benefits to men and women *or* for requiring different contributions from men and women, based on longevity.

Even if the Secretary were to issue a new bulletin saying that Labor was going to prosecute plans requiring differential contributions such bulletin would be entitled to "no standing in court," as a matter of legislative intent. (App. E-13.) The defendant would be entitled to rely as a defense, on the plain meaning of the previous administrative bulletin, just as the Supreme Court relied on the plain meaning of such bulletins in *General Electric*. Finally, the question would be not whether the defendant violated any bulletin but whether the statute had been violated. The Legislature has directed that the Secretary show that the exceptions do *not* apply. On that issue the defendant is entitled to the impartial decision of the court. To give effect to a position advocated by the Secretary because previously published in a bulletin denies the defendant an impartial determination by the Court that Congress intended the defendant have.

However, in the instant case five days before oral argument in the Court of Appeals, an attorney for the Secretary of Labor filed an "amicus" brief urging the court to disregard the plain meaning of its bulletins on *pensions*. Instead, the "amicus" urged that a *different* bulletin was now "controlling" and it should now be construed so that *it* did not conflict with a post-1972 EEOC position. That new EEOC position was that a retirement plan had to have equal benefits *and* equal employee contributions (29 CFR §1604.9(f) (1972);

compare prior position 30 F.R. 14926, 14928 Dec. 2, 1965, Section 1604.7).

Obviously the latter is impossible *unless* women as a matter of law must be paid more compensation; the several administrative positions are irreconcilable. (See Dissent, App. D-7, D-8.)

The issue of law, however, is the intent of Congress and *not* whether there is unanimity among administrative interpretations. By giving "deference" to a supposed *lack* of conflict among some of the administrative interpretations, the lower court failed to exercise its constitutional and statutory responsibility to independently and impartially determine Congressional intent. *General Electric* clearly holds the courts should *not* so abdicate their responsibility. Further, the specific Congressional intent under both the Equal Pay Act and Title VII is that the courts, not the administrative agencies, should be the law-interpreting body.

Moreover, even where an agency has express Congressional authority to issue "legislative regulations", a defendant may challenge a regulation on the ground that it is invalid because inconsistent with the statute and the intent of Congress. Obviously where such a challenge is raised, the agency's interpretation of the law as expressed by its regulation is *not* the measure of the intent of the law. For the Court of Appeals to have rejected the legislative history which showed the law's intent, as an "erroneous interpretation" of the law's intent, and to do so *based on* newly advanced *administrative* interpretations, was not only fallacious but also denied your petitioners a hearing and determination on one of the precise issues of law your peti-

tioners raised, namely that the content of the administrative interpretation was not in accordance with the statute and its intent.

On that issue, the language of the Bennett Amendment and the legislative history of the equal pay bills flatly contradict the content of the administrator's bulletin that the majority relied on in its second opinion below. The Bennett Amendment says "it shall *not* be an unlawful employment practice . . . *to differentiate upon the basis of sex* in determining the amount of the wages or compensation paid or to be paid. . . ." (Emphasis added.) On the equal pay bills, the Senate Committee Report said that under the single broad exception provided in its bill, wage differentials based on employer cost differentials were not outlawed. In the House, specific legislative history likewise shows the same express intent not to prohibit differentiation by sex as to wages and costs. (App. E-4.) The House bill, noted Senator Dirksen, better expressed Senate intent and was thereafter adopted by the Senate. (App. E-4.)

In sharp contrast to this statutory language and clear history that "to differentiate upon the basis of sex" is not *ipso facto* unlawful, the bulletin of the Secretary says that compensation differentials may not be based on cost differentials because (it says) a comparison of cost differentials upon the basis of sex is *ipso facto* unlawful because differentiation upon the basis of sex is *ipso facto* unlawful. (App. E-18.) This contradicts the statute and the bulletin on pensions. Yet this is the bulletin the majority relied on in denying rehearing. (App. D-3.)

The bulletin is not faithful to the law. It would seem that even the *issuance* of that bulletin by the Secretary exceeds the *constitutional* authority of the executive branch which is *constitutionally* charged "to take care that the laws be *faithfully* executed." (Const. Art. II, §3.)

For the Court of Appeals to *rely* on such bulletin not only exalts the agent over the principal, when the principal has expressly stated that the agents' interpretations shall have no standing in court except as a defense for the defendant, but it also implies to the executive branch that it is "above the law", that it has no duty to be faithful to the laws Congress enacts, that it need not take care regarding the will of Congress, but may instead follow the dictates of its own will.

The Legislature directed that the Secretary must show that a pay differential is *not* based on an "other factor other than sex," or any other statutory exception. For the Court of Appeals to "rely" on the administrator's interpretation that compensation differentials may not be based on employer cost differentials is tantamount to a repeal of *all* the statutory exceptions, since all depend on cost. It says not only are there no exemptions but also that the courts will *hear* no defenses. It is to adopt the erroneous rationale of *one* bulletin of the administrator (that differentiation by sex is prohibited by the statute), when the statute on its face and its legislative history states the exact opposite.

By hypothesis, *any* pay differential would rest in part on differences in other costs as its practical justification. So if costs correlated to sex differentiation were no justification for a pay differential correlated to

sex, there would be no statutory exceptions. But Congress expressly stated and intended the contrary.

Finally, this Honorable Court has relied on bulletins to hold in *favor* of defendant in *General Electric,* but the court below relied on a bulletin to hold *against* defendant. This also was contrary to congressional intent.

Moreover, as recently as 1972 Congress specifically rejected proposals to grant the EEOC quasi-legislative and quasi-judicial authority, *and* rejected proposals to define unlawful discrimination more broadly.

Having failed in the Legislature, the EEOC then issued new "guidelines" post-1972 and sought as an "amicus" in both courts in the instant case to have the *courts* adopt those new interpretations as defining prohibited conduct under the statute.

The success of this improper action by the EEOC is shown by the fact that the District Court made an express finding that the EEOC "amended its regulations" in 1972, and the District Court based its judgment on such "amended regulation." (App. B-10-12.)

The EEOC had similar success in the Court of Appeals. While this Court explicitly pointed out in *General Electric* that "guidelines" are *not* regulations, even the Dissenting Opinion expressly referred to them as "regulations." (App. D-8.)

The EEOC is a prosecutor. But it has clothed itself with authority it does not have, which this Court has plainly said it does not have, and yet which the lower courts persist in erroneously assuming that it does have, all to the injury of your petitioners.

In fact, Congress in 1972 declined to grant such authority to the agency, based on its finding that the

agency was not impartial, but an advocate of policies beyond those which Congress chose to enact into law. (App. E-16-17.)

For the lower courts to give effect to "guidelines" as if they were impartial pronouncements above the highest court and the Constitution was to act in excess of the courts' own jurisdiction as conferred by statute. (42 U.S.C. §2000e-5, App. A-4.) Congress expressly limited that jurisdiction in enacting Title VII in 1964. It expressly reaffirmed certain of those limitations in 1972. App. E-16.)

The jurisdictional limitations of the statute contemplate that the courts give effect to the statute both in respect to what conduct is prohibited and in respect to the *absence* of quasi-legislative and quasi-judicial authority in the agency. For the lower courts to have disregarded the Congressional intent on either point is to act outside their own jurisdiction as expressly limited by the statute. It also denies to the Petitioners that right to an *impartial* determination of issues that both the Constitution *and* the statutes guarantee. As to your individual petitioners it is a denial of due process of law guaranteed by the 14th Amendment.

II. The Decision of the Court of Appeals Presents an Important Federal Question Which Has Nationwide Impact on the Pension, Annuity and Insurance Industry, as Well as on Cities and States.

The funding of pensions, annuities and insurance plans depends upon an actuarial determination of aggregate risk, dividing the projected cost among the members of the group covered. This is universally done by the use of separate mortality tables for males and females because of the significant difference in life expectancy between females and males. For example,

a graph offered by amicus for respondents in the Court of Appeals, showed that given a sample of 100,000 males and 100,000 females who retire at age 65 and live through age 107, by the median age 83 where the two mortality curves intersect, 65,600 males will have died and only 48,800 females, 34,400 males would remain, and 51,200 females. This statistic means there would be 48% more females to provide retirement benefits for at age 83 than for the males at that age. In other words, beginning at age 65, and each year until age 83, more males die than females. Consequently more funds must be available to provide benefits to the larger number of females alive after that age.

The entire industry depends upon actuarial tables which thus separate males from females. Indeed, Congress under ERISA [Pension Reform Act of 1974, P.L. 93-406, 88 Stat. 829] set up three agencies for federal pension law enforcement, the Internal Revenue Service, the Department of Labor and the Pension Benefit Guarantee Corporation. Actuarial requirements are stressed under the Act [26 U.S.C. (IRC 1954) §410 *et seq.*, Act §§302-305]. The Pension Benefit Guarantee Corporation in December 1975 specifically set up no less than six such *sex-differentiated* tables for funding [40 F.R. 57980, 57982, 29 C.F.R. 2610, 2611]. The Court may properly look to recent Congressional action in the pension area to assist in its interpretation of other laws as applied to pension problems. *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 38 L.Ed.2d 287, 94 S.Ct. 334 (1973). On the other hand there are to our knowledge no unisex mortality tables. (Dissenting Op., D-4.) Even if there were, their use would discriminate against males.

The decision of the Court of Appeals will have a heavy financial impact on retirement plans across the country. For example, in an affidavit filed in the New York case of *Diana L. Spirt v. TIAA-CREF* (N.Y., S.D. 74 Civ. 1674), the actuary estimated that changing that system alone (which involves equal contributions for unequal monthly benefits) to a unisex system, over the collective lifetimes of 100,000 retired males and 100,000 retired females would cost 2.3 *billions* of dollars. Whether a court orders equalizing monthly employee contributions or monthly benefits, the cost of the system must increase, not to mention the additional cost of refunds ordered. Cases in this area are now proliferating in the federal courts across the country. To name a few: *Spirt v. TIAA-CREF, supra; Henderson v. Oregon,* 405 F.Supp. 1271 (1975) on appeal in the Ninth Circuit; *Rosina Smith et al. v. County of Los Angeles* (Cal.C.D. 74-253); *Peters et al. v. Wayne State University et al.* (Mich. E.D. 670-165); *EEOC v. Colby College* (Maine D.C. S.D. 75-136); *Bailey v. Los Angeles County* (75-3863 C.D. Cal.); *American Nurses Assoc. et al. v. Board of Governors of the University of North Carolina et al.* (USDC Mid. D. N. Carolina C 75-558-G).

Your petitioners have been contacted by other public retirement systems which have either unequal contribution rates or unequal benefit rates based upon recognized actuarial tables. They await the outcome of this case to decide whether they must change their systems at great expense and face additional extensive liability for "back pay," as a result of complying with laws such as California Government Code §45342 which require actuarial soundness (See App. F).

The Court of Appeals, in a simplistic error, said that equalization could be arrived at by spreading the cost over all of the members. Aside from the fact that such discriminates against the male employees, it would be in violation of the Equal Pay Act. This Court held in *Corning Glass Works v. Brennan,* 417 U.S. 188, 207, 41 L.Ed.2d 1, 17, 94 S.Ct. 2223 (1974) that increasing the burden on one class of employees to provide "equal pay" for another class is in violation of the Equal Pay Act. (See also 29 U.S.C. §206(d)(1), A-1.)

To allow the decision below to stand will invite an unnecessary multiplicity of lawsuits to "equalize" benefits or contributions, or both; and to recover back contributions or increase future benefits, or both.

III. An Award of Back Contributions From a Local Government Entity and the Permanent Injunction Is in Excess of the Court's Jurisdiction as Limited by Title VII and by Article III and the 10th, 11th and 14th Amendments of the United States Constitution.

There are several major jurisdictional limitations exceeded by the decisions below.

The 1972 Amendments to Title VII were enacted by Congress pursuant to §5 of the Fourteenth Amendment which empowers Congress to enforce the Fourteenth Amendment by appropriate legislation. (*Garland M. Fitzpatrick v. Frederick Bitzer,* 427 U.S. 445 (1976).

The Honorable Court has construed the Due Process and Equal Protection provisions as not prohibiting classifications such as defendants' Plan where there is a rational basis therefor. *Kahn v. Shevin* (1974) 416 U.S. 351, 40 L.Ed.2d 189, 94 S.Ct. 1734; *Schlesinger*

v. Ballard (1975) 419 U.S. 498, 42 L.Ed.2d 610, 95 S. Ct. 72; *Geduldig v. Aiello* (1974) 417 U.S. 484, 41 L.Ed.2d 256, 94 S.Ct. 2485.

Similarly the statute on its face and its legislative history show that a classification related to sex "where there is a rational basis" (App. E-9) is *not* prohibited unless the plaintiffs show such is not in good faith or is a subterfuge. See *Schultz v. Wheaton Glass Co.,* 421 F.2d 259 (3d Cir. 1970) *cert. den.* 398 U.S. 905 (Dissent, D-9).

It cannot be supposed that Congress is empowered by Section 5 of the 14th Amendment to enact legislation *prohibiting* classifications that are *permitted* by the 14th Amendment. Hence if Congress had enacted a law prohibiting rational classifications or requiring irrational ones, it would be acting in excess of its 14th Amendment power.

Consequently, assuming *arguendo* that the trial court was correct that "rational" classification is prohibited (and irrational classification therefore required) by Title VII, it would follow necessarily that to that extent Congress acted in excess of its 14th Amendment power.

Such exercise of power would therefore have to be sustained, if at all, under some other grant of power—the commerce clause, for example.

But this Honorable Court has held that the Tenth Amendment is a limitation on the exercise of the commerce clause power in respect to cities. Such amendment provides that powers not delegated to the United States are reserved to the States, and the authority of Congress to regulate in a *manner* which invades local sovereignty is limited thereby.

Thus this Honorable Court has held that Congress may not regulate compensation of civil service employees. The court stated in *National League of Cities v. Usery* (1976) 426 U.S. 833, 49 L.Ed.2d 245, 253, 96 S.Ct. .....:

> "We have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the *matter,* but because the Constitution prohibits it from exercising the authority in that *manner.*" (Emphasis added.)

Management of the City Department's retirement plan is likewise a function of local government under state law (Charter §220.1, California Stat. 1937, Chap. 3, Resolutions, p. 2627). (App. F.) The City Charter Section 220.1, and similarly, California Government Code Section 45342, require that the Plan be maintained on a sound actuarial basis. Requiring refunds of previous contributions prior to retirement interferes with actuarial soundness in a manner not required by equal protection or due process.

Further, despite the Court's Opinion (App. C-24) that the Department could pass on the cost of refunds by increasing all contributions or lessening benefits, such is not permitted by State law or by the Equal Pay Act. (State Law) *Houghton v. Long Beach,* 164 Cal.App.2d 298, 306 (1958); *Henry v. City of Los Angeles,* 201 Cal.App.2d 299, 314; (Equal Pay Act) (*Corning Glass Works v. Brennan,* 417 U.S. 188, 207, 41 L.Ed.2d 1, 17, 94 S.Ct. 2223 (1974), 29 U.S.C. §206(d)(1)). The Department is penalized by

the decision because it must now reach into other city revenues to pay the difference. (See *Edelman v. Jordan* (1974) 415 U.S. 651, 653.)

It is likewise interfered with by the permanent injunction. Any legislation of Congress under either the Fourteenth Amendment or under the commerce clause, for example, which interferes with the authority of local governmental entities to establish pension plans for its civil service employees would be an invalid invasion of local sovereignty. So would a law requiring payment of higher compensation to female civil service employees than males.

For the same reasons, the permanent injunction of the lower court and its award of back contributions exceeds the limitations of the Tenth Amendment. Such amendment is a limitation on all the powers delegated to the United States, including the judicial power delegated by Article III, and not merely a limitation on those legislative powers that have been delegated to the Congress by Article I. As the Congress may not enact a law which interferes with local sovereignty, so the Court may not issue a decree which so interferes.

Assuming *arguendo* that by enacting Title VII Congress had enacted a law which required the payment of higher compensation to female civil service employees than to males, for the courts to give effect to such a law would exceed the constitutional limitations on the *courts'* power. The court may not so act. That was the precise holding of *Marbury v. Madison,* 1 Cranch 137, 2 L.Ed. 60 (1803). The Court held that it would *not* exercise a power (even though Congress purported to confer or acknowledge it) when to do so would have the effect of the Court exceeding

constitutional limitations upon it. The duty of the Court, the Chief Justice said, is to "read and obey" the law which *limits* the Court's power.[7]

For the same reasons dealing with the Tenth Amendment, we submit that there also is a violation of the Eleventh Amendment by the decisions below. In *Fitzpatrick v. Bitzer, supra,* 427 U.S. 445, 456, fn. 11, the Court noted that such challenge was not raised there. We have raised and do raise such a challenge.

There is another major jurisdictional limitation exceeded by the decisions below. Section 5 of the 14th Amendment gives the *Congress* the authority to enforce that article by appropriate legislation. That grant of authority is, we submit, exclusive. Especially where (as here) the Congress has *exercised* that authority, where it has enacted certain policies into law, it is not within the powers of either the executive or the judicial branch to give effect to *different* policies even for the purposes of "enforcing" the 14th Amendment. Any different view would lead to governmental chaos.

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[7]A different view of judicial power was indicated by the infamous and erroneous *Dred Scott* decision more than half a century later. The latter view was that the Constitution gives "prerogative authority" to the Courts to "review" legislation. *Dred Scot v. Sanford,* (1856) 19 How. 393, 15 L.Ed. 691. In contrast, the rationale of Marshall, *C.J.* was that the Court did not have prerogative power; it would give effect to a law of Congress *unless* by so doing the Court would itself exceed some constitutional limitation, which limitations apply to the Court as well as to Congress. The *Dred Scott* decision was the second in history to nullify congressional action. In his first Inaugural Address, President Lincoln rejected the *Dred Scott* theory of the Court's power. The errors of *Dred Scott* have never been *judicially* acknowledged.

We have above noted the express jurisdictional limitation on the executive's following different policies. The executive is charged that "the laws be faithfully executed" (Art. II §3). The limitation of faithfulness likewise applies to any agent (such as EEOC) that is an agency of Congress, its principal.

Express limitations also exist with respect to the courts' authority. Congress has clear constitutional authority to specify the jurisdiction of the courts. Const. Art. III. *Sheldon v. Sill* (U.S. 1850) 8 How. 440, 12 L.Ed. 1147, *Ex Parte McCardle* (U.S., 1869) 7 Wall. 506, 19 L.Ed. 264.

Thus, where, as here, Congress has not only exercised the authority granted by Section 5 of the 14th Amendment, but has also limited the courts' jurisdiction under that statute to those "adverse *actions*" as are defined by the statute and are "intentionally engaged in", it is not within the courts' power to develop broader definitions of unlawful discrimination in terms of "systems or effects" or otherwise. In fact it was to prevent that possibility that led to adopting the jurisdictional limitation in 1964. While in 1972 it was proposed to permit the development of a broader definition of unlawful discrimination in terms of "systems and effects", that proposal was rejected and the jurisdictional limitations expressly reaffirmed. (App. E-15-18.)

Since 1972 the courts may now exercise broader *remedial* authority than under the 1964 statute, *after* it has been found that an "adverse action" as statutorily

defined has been "intentionally engaged in". However Congress in 1972 again precluded the courts from any "common-law-making" role in defining unlawful employment practices by express reaffirmations of the jurisdictional limitations of Title VII. (See App. E-16.)

Of course Congress may so limit the courts. "There can be no question of the power of Congress to define and limit the jurisdiction of the inferior courts of the United States." *Lauf v. E. G. Skinner & Co.,* 303 U.S. 323, 330 (1938).

The trial judge herein seemed unconcerned with the statutory language. He did not even make the findings which the statute requires as the condition precedent to the exercise of the courts' *remedial* jurisdiction under the statute (App. B-10-12), namely that the City was "intentionally engaging in" an unlawful employment practice as stautorily defined. The trial court likewise ignored the jurisdictional limitation on an award of "back pay"—that such shall not be awarded if the action of the employer was "for *any* reason other" than discrimination[8] on account of sex (App. A-5). These lapses of the trial court, plus its reliance on the EEOC "amended regulation" demonstrate that the

[8]There was extensive and careful attention given to the meaning of "discrimination" in the 1963-64 debates. The Congressional Record is very clear that although the *opponents* of the bill charged it had a new broad, sweeping meaning, the *proponents* of the bill whose intent is controlling said that it had the same well established meaning it already had under a number of already existing statutes. (110 Cong. Rec. 7218, 5803, 5437, 7477.)

trial court was not exercising its statutory *judicial* jurisdiction, but some new legislative jurisdiction.

That the Court may not act in excess of statutory jurisdiction (even if it had "enforcement" authority under the Fourteenth Amendment) is one of the foundations of the "checks and balances" of American government. See *Sheldon v. Sill* (U.S. 1850), 8 How. 440, 12 L.Ed. 114); *Ex Parte McCardle,* 7 Wall 506, 19 L.Ed. 264.

Conclusion.

Here, classification for purposes of the pension system does not adversely affect the "employment status" of any individual woman employee. While there is differentiation between men and women, upon the basis of sex there is no discrimination "*against*" an individual with respect to compensation because of sex. Therefore no adverse action or unlawful employment practice as defined by statute has been shown under either subsection of 42 U.S.C. §2000e-2(a).

Additionally Title VII specifically provides that it shall *not* be an unlawful employment practice to "differentiate upon the basis of sex in determining the amount of wages or compensation" if such differential in payment is for any "other factor other than sex." Here the factor was life expectancy or longevity. For the courts below to expand the definition of unlawful employment practices to prohibit differential payment for that factor where made on a rational basis, without any showing that such was done as a subter-

fuge and not in good faith, exceeded the courts' power as limited by Article III of the Constitution and Title VII, (42 U.S.C. §2000e-5(g)) in addition to violating the 10th, 11th and 14th Amendments.

Hence, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit or alternatively to command the Court below to re-examine its decision in the light of *General Electric Co. v. Gilbert,* the statutes, the legislative history, and the United States Constitution.

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APPENDIX A.

Fair Labor Standards—29 U.S.C. § 206.

(d) (1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided,* That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

(2) No labor organization, or its agents, representing employees of an employer having employees subject to any provisions of this section shall cause or attempt to cause such an employer to discriminate against an employee in violation of paragraph (1) of this subsection.

(3) For purposes of administration and enforcement, any amounts owing to any employee which have been withheld in violation of this subsection shall be deemed to be unpaid minimum wages or unpaid overtime compensation under this chapter.

(4) As used in this subsection, the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

42 U.S.C. § 2000e-2.
Unlawful Employment Practices.

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * *

(e) Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor

organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

* * *

Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discrim-

inate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

* * *

42 USC § 2000e-5(g).

Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission.

Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

APPENDIX B.

Marie Manhart et al., Plaintiffs, v. City of Los Angeles, Department of Water and Power, a body corporate and politic, et al., Defendants. Civ. No. 73-2272-HP.

United States District Court, C. D. California.

Jan. 15, 1975.

Female employees of city water and power department brought action challenging requirement that female employees make larger monthly contributions than their male counterparts in order to receive the same monthly retirement benefit as the male employees. Plaintiff moved for a preliminary injunction. The District Court, Pregerson, J., held that such practice violated the Equal Employment Opportunity Act notwithstanding that such differentiation was based on actuarial tables indicating that women as a class tend to live longer than men, that the Act requires that each person be treated as an individual and not on the basis of characteristics generally attributed to any racial, religious or sex group and that a preliminary injunction would issue.

Motion granted.

MEMORANDUM AND ORDER GRANTING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

PREGERSON, District Judge.

This matter arises upon a motion for preliminary injunction. Plaintiffs, Marie Manhart, Carolyn Mayshack, and other employees of the Los Angeles Department of Water and Power initiated this action against the Los Angeles Department of Water and Power be-

cause female employees of the Department are required to make larger monthly contributions than their male counterparts in order to receive the same monthly retirement benefits as these male employees. In plaintiffs' view, this practice violates § 703 of the Equal Employment Opportunity Act of 1972, 43 U.S.C.A. § 2000e-2 (West 1974). According to defendants, however, this differentiation between male and female employees is justified by actuarial tables which indicate that women as a class tend to live longer than men and that therefore female employees are likely to receive retirement benefits for a longer duration than their male counterparts. In short, defendants argue that women should pay more to get more.

In order to issue a preliminary injunction, the court must make the following determination: (1) that plaintiffs are likely to prevail on the merits, (2) that plaintiffs will suffer irreparable harm without preliminary relief, (3) that defendants will not be unduly injured by the injunction, and (4) that an injunction promotes the public interest. Seamen v. Spring Lake Park Independent School District No. 16, 363 F.Supp. 944, 945 (D.Minn.1973); United States v. Local 638, 337 F.Supp. 217, 220 (S.D.N.Y.1972). See King v. Saddleback Junior College Dist., 425 F.2d 426 (9th Cir. 1970).

The major question on this motion is whether plaintiffs have a reasonable likelihood of success on the merits. To make this determination, the court must decide whether the Department's practice of requiring women to make larger monthly contributions to the retirement plan than men constitutes "[discrimination] against any individual with respect to his compensation,

terms, conditions, or privileges of employment, because of such individual's . . . sex . . ." within the meaning of § 703(a)(1) of the Equal Employment Opportunity Act of 1972. 42 U.S.C.A. § 2000e-2(a)(1) (West 1974).

Several sources of authority support the conclusion that the Department's practice in question here constitutes sexual discrimination under § 703(a)(1). Initially, it should be pointed out that this section applies to retirement plans. Bartmess v. Drewrys USA, Inc., 444 F.2d 1186 (7th Cir. 1971); Rosen v. Public Service Electric & Gas Co., 477 F.2d 90 (3d Cir. 1973). Moreover, current regulations of the Equal Employment Opportunity Commission (EEOC) issued under the authority of § 713 of the Act, 42 U.S.C.A. § 2000e-12 (West 1974), not only suggest that § 703(a)(1) applies in this case, but also indicate that the Department's practice gives rise to sexual discrimination. According to these current regulations, "it shall not be a defense under Title VII to a charge of sex discrimination in benefits that the cost of such benefits is greater with respect to one sex than the other," 29 C.F.R. § 1604.9(e), and "it shall be an unlawful employment practice for an employer to have a pension or retirement plan . . . which differentiates in benefits on the basis of sex." 29 C.F.R. § 1604.9(f).

The EEOC has recently applied these standards to an analogous case in which retired female employees received lower monthly payments under their annuities than their male counterparts. Decision No. 74-118, CCH EEOC Decisions ¶ 6431 (Employment Practices Guide, 1974). Under the facts of that case, female employees had contributed the same amounts for the

annuity benefits as male employees. In rejecting the argument that equalization of monthly payments would discriminate against males, who, as a class, would receive less because they tend to die sooner, and in favor of females, who would receive more because they generally die later, the EEOC stated:

> A argues that equal payments to female retirees would in fact discriminate in their favor because females, statistically, live longer than men. The logic of this argument is that usually used to support discrimination: an appeal to the average characteristics of a particular sex, race, or other group protected under Title VII. But no person knows when he or she will die.
>
> * * *
>
> Thus we think that A's argument misses the point. All that A's sex-segregated actuarial tables purport to predict is risk spread over a large number of people; the tables do not predict the length of any particular individual's life.
>
> In our view, any use of sex-segregated actuarial table that results in payment of different periodic pension benefits to males and females is highly suspect. Because actuarial tables do not predict the length of any individual's life, any claim that such tables may be used to assure equal pension payments over a lifetime between males and females must fail. In order to achieve compliance with Section 703(a) of Title VII and with the Commission's Guidelines on Discrimination Because of Sex the periodic pension benefits paid to males and females in equivalent circumstances must be equal. Moreover, it would not be a defense to Charging Party's charge that equalizing males' and females' periodic pension benefits would result in higher costs to Respondents if indeed this were shown to be a fact. Guidelines on Discrimination Because of Sex, 29 CFR Sec. 1604.9(3). See, also, Taylor v. Goodyear Tire & Rubber Co., 5 EPD Para. 8545, 6 FEP Cases 50 (N.D.Ala., 1972).

(Footnotes omitted.) EEOC Decision 74-118, pp. 3-5.

As plaintiffs correctly point out, the only difference between the facts of EEOC Decision 74-118 and the facts of the case at bar is that instead of taking equal contributions from both sexes and supplying lower benefits to females, the defendants in the present action take more contributions from females and supply equal benefits to both sexes. In either case, the reason for this differential treatment is the actuarial fact of female longevity which, in effect, involves the application of characteristics that may be true of a class of people to individuals within the class for which the characterization may or may not be true. Therefore, EEOC Decision 74-118 is directly applicable to the present case, and dictates a finding of sexual discrimination here. As such, it is entitled to great deference in this court. Griggs v. Duke Power Co., 401 U.S. 424, 433-434, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971).

The conclusion that the defendants' differential treatment of female employees violates § 703(a)(1) is supported by a recent Harvard Law Review comment, Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv.L.Rev. 1109, 1172-1176 (1971). In its discussion of discrimination based on statistical differences and life insurance benefit pro-

grams, the comment takes the position that employers must provide the same life insurance benefits to male and female employees even though employers must pay higher premiums for males than for females due to actuarial female longevity. The comment reaches this conclusion because "Title VII, in the field of employment, requires evaluation on an individual basis rather than a prediction made on the basis of a sex-defined group," and because "Title VII focuses on presenting each employee in an individual light, free from conclusions that may be drawn from the individual's membership in one sex or the other." 84 Harv.L. Rev. at 1174.

The basic principle which emerges from these authorities and from the case law is that sexual discrimination under § 703(a)(1) exists whenever general fact characteristics of a sex-defined class are automatically applied to an individual within that class. See Phillips v. Martin Marietta Corp., 400 U.S. 542, 91 S.Ct. 496, 27 L.Ed.2d 613 (1971); Rosenfeld v. Southern Pacific Co., 444 F.2d 1219 (9th Cir. 1971); Sprogis v. United Air Lines, 444 F.2d 1194 (7th Cir. 1971); Willingham v. Macon Telegraph Publishing Co., 482 F.2d 535 (5th Cir. 1973). In passing Title VII, Congress established a policy that each person must be treated as an individual and not on the basis of characteristics generally, and often falsely, attributed to any racial, religious, or sex group. See Rosenfeld v. Southern Pacific Co., *supra* 444 F.2d at 1225. More particularly, Congress intended in regard to sexual discrimination cases to strike at the entire spectrum of disparate treatment of individual men and women resulting from sex stereotypes. Sprogis v. United Air Lines, Inc., *supra* 444 F.2d at 1198. In short, under the Equal Employ-

ment Opportunity Act of 1972, all stereotypic treatment of persons based on race, religion, or sex whether rational or irrational is dead. Because the Department of Water and Power's practice in question here violates these considerations by applying the general actuarial characteristic of female longevity to individual female employees who in reality may or may not outlive individual male employees, the court concludes that plaintiffs have established a case of discrimination under § 703(a)(1) of the Equal Employment Opportunity Act.

Defendants attempt to establish a defense under § 703(h) of the Equal Employment Opportunity Act of 1972. 42 U.S.C.A. § 2000e-2(h) (West 1974). This section states in part that "it shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of wages or compensation paid or to be paid to employees . . . if such differentiation is authorized by the provisions of section 206(d) of Title 29." Section 206(d) states in part that "no employer . . . shall discriminate . . . between employees on the basis of sex by paying wages to employees . . . at a rate less than the rate at which he pays wages to employees of the opposite sex . . . for equal work . . . except where such payment is made . . . (iv) a differential based on any other factor other than sex: *Provided,* That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee." 29 U.S.C.A. § 206(d)(1).

Defendants fail to explain how § 206(d)(1) justifies higher retirement contributions for women. Instead,

they cite § 703(h) and immediately refer to 29 C.F.R. § 800.116(d), a regulation of the Wage-Hour Administrator which implies that segregated actuarial treatment of men and women does not violate the Equal Pay Act. Even if § 206(d)(1) applies to this case, the court believes that differentiation based on sex segregated actuarial tables constitutes a differential based on the "factor" of sex in violation of that section.

The court also concludes that the other elements necessary to support a preliminary injunction are present in this case. Where statutory civil rights of employees are found to have been violated, irreparable injury may be presumed from loss of human dignity which such violations engender. See United States v. Hayes International Corp., 415 F.2d 1038, 1045 (5th Cir. 1969). Moreover, as plaintiffs' affidavits suggest, the potential for irreparable injury is great in that we deal with the present ability of female employees to provide the necessities of life for themselves and their families. Finally, the very subject of this action, sexual discrimination, and the number of persons affected by the Department's practice, supports the conclusion that a preliminary injunction would serve the public interest.[1]

Accordingly, it is ordered that plaintiffs' motion for a preliminary injunction is granted.

It is further ordered that this Memorandum and Order shall constitute the court's findings of fact and

[1]While this opinion was in draft form, the court was notified by defendants in a copy of a letter dated December 26, 1974 that the Department of Water and Power and the Board of Administration of the Department of Water and Power Employees Retirement Plan had adopted a resolution on December 23, 1974, equalizing male and female contributions to the Retirement Plan.

conclusions of law as authorized by Rule 52 of the Federal Rules of Civil Procedure.

It is further ordered that the Clerk of the Court shall serve copies of this Memorandum and Order, by United States mail, upon the attorneys of record for the parties herein.

Findings of Fact.

It is true that:

1. The plaintiffs, Carolyn Mayshack, Margerie Stoop, Alice F. Muller and Ethel L. Lehman, are employees of the defendant, Department of Water and Power of the City of Los Angeles ("Department"). The plaintiff, Marie Manhart, is a former employee of the Department. The plaintiff, Committee to Protect Women's Retirement Benefits, is an association of female, supervisory employees of the Department. The plaintiff, International Brotherhood of Electrical Workers, Local Union No. 18 ("Union"), is an unincorporated labor organization, whose members include certain women who are employed by the Department.

2. The defendant, Department of Water and Power of the City of Los Angeles, employs approximately 2,000 females. The defendant, Board of Commissioners of the Department of Water and Power, directs the affairs of the Departm[illegible]. The defendant, Board of Administration of the Department of Water and Power Public Employees' Retirement, Disability, and Death Benefit Insurance Plan, administers the benefit plans maintained for employees of the Department.

3. The Department maintains a Public Employees' Retirement, Disability, and Death Benefit Insurance Plan ("Plan"). The Plan is funded by compulsory

employee contributions which are matched 110% by compulsory employer contributions. The Plan is also funded by earnings on all contributions.

4. Between March 24, 1972 and December 31, 1974, the Plan paid the same monthly benefits to male and female retirants of the same age and length of service. However, higher contributions were required of female employees than males because acturarial tables used in the administration of the Plan indicate that women in general live longer than men and that women would therefore tend to collect monthly payments for a longer period of time.

5. On or about June 5, 1973, the Union filed with the Equal Employment Opportunity Commission ("EEOC") a charge alleging that the Plan discriminated against females because it required them to contribute more than their male counterparts. The United States Department of Justice issued a notice of right to sue letter on or about September 17, 1973. The plaintiffs filed a complaint in this court on September 26, 1973.

6. The plaintiffs employed legal counsel, who rendered valuable services to the classes in the litigation of the issues presented in this case.

7. On April 5, 1972, the EEOC amended its regulations to state: "It shall not be a defense under Title [VII] to a charge of sex discrimination in benefits that the cost of such benefits is greater with respect to one sex than the other." 29 C.F.R. 1604.9(e).

The following Conclusions of Law, insofar as they may be considered Findings of Fact, are so found by this court to be true in all respects.

Conclusions of Law.

1. The court has jurisdiction of the plaintiffs' action which was brought pursuant to Section 706(f) of Title VII of the Equal Employment Opportunity Act of 1972 ("Act") (42 U.S.C. § 2000e-5(f)).

2. The plaintiff Union filed a timely charge with the EEOC. After receiving a notice of right to sue letter from the United States Department of Justice, the plaintiffs filed a timely complaint in this court. The plaintiffs have satisfied the jurisdictional prerequisites of the Act for bringing suit in this court.

3. The Department is an employer within the meaning of Section 701(b) of the Act (42 U.S.C. §2000e (b)).

4. With respect to the cause of action brought under Title VII of the Act, on January 25, 1974, the court certified classes which included (a) all female employees presently working for the Department who are members of the Plan, (b) all female members of the Plan who retired from the active service with the Department on or after March 24, 1972, (c) all female employees who resigned from active service with the Department on or after March 24, 1972 and who left their compulsory employee contributions on deposit with the Plan, and (d) all women hired by the Department who became members of the Plan prior to the resolution of this action.

5. The Department's practice of requiring females to make larger monthly contributions to the Plan than their male counterparts is an unlawful employment practice within the meaning of Section 701(a)(1) of the Act (42 U.S.C. § 2000e-2(a)) and no defenses

under Section 703(e) and (h) of the Act have been stated (42 U.S.C. § 2000e-2(e), (h)).

6. The Eleventh Amendment to the United States Constitution does not bar a money recovery against the defendants in this action.

7. The defendants should have been placed on notice that their practice of differential contributions constituted an unlawful employment practice under Section 701(a)(1) of the Act when the EEOC amended its regulations on April 5, 1972 to include what is now 29 C.F.R. 1604.9(e).

8. Under Section 706(g) of the Act, each member of the classes defined in Paragraph 4 of these Conclusions of Law is entitled to a refund measured by the difference between the contributions she was required to make on and after April 5, 1972 and the contributions required of a male who entered the service of the Department at the same age, and on the same date, and earned the same rate of pay throughout his service as the female member of the class. In addition, each member of the class is entitled to interest at seven percent (7%) on her overpayments running from the date of contribution.

9. Counsel for the plaintiffs are entitled by Section 706(k) of the Act (42 U.S.C. § 2000e-5(k)) to reasonable attorneys' fees payable by the defendants.

Dated: June 20, 1975.

HARRY PREGERSON
Harry Pregerson
United States District Judge

APPENDIX C.

Opinion of the Court of Appeals for the Ninth Circuit.
(Amended: December 23, 1976)

United States Court of Appeals, for the Ninth Circuit.

Marie Manhart, et al., *Plaintiffs-Appellees,* vs. City of Los Angeles, Department of Water and Power, a body corporate and politic, et al., *Defendants-Appellants*. No. 75-2729, No. 75-2807, No. 75-2905.

[November 23, 1976]

Appeal from the United States District Court for the Central District of California

Before: CHAMBERS, DUNIWAY and KILKENNY, Circuit Judges

DUNIWAY, Circuit Judge:

The question presented in this case is whether a retirement plan which requires women employees to contribute from their wages 15% more than similarly situated male employees because of the longer average life expectancy of women violates the Civil Rights Act of 1964, Title VII, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-2. The district court held that the plan violated Title VII,[1] enjoined the employer from charging the

[1]The relevant provision of Title VII reads:
§ 2000e-2
(a) It shall be an unlawful employment practice for an employer—
(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

higher contribution rate against women, and awarded a refund of all excess contributions made on or after April 5, 1972. *Manhart v. City of Los Angeles, Department of Water and Power,* C.D. Cal., 1975, 387 F.Supp. 980.

This is a class action brought by women employees and retirees of the City of Los Angeles, Department of Water and Power [hereinafter "Department"]. The defendants are the Department, the members of the Board of Commissioners of the Department, the members of the Board of Administration of the Department's Employees' Retirement, Disability, and Death Benefit Insurance Plan, the Department's chief accounting officer, and the Department's general manager.

All employees of the Department are required to participate in the established retirement plan which is funded and managed solely within the Department. Each employee must make a monthly contribution to the retirement plan, and the Department matches that contribution 110%. These funds are deposited with the city treasurer but are kept separate and apart from all other monies of the city. The chief accounting employee of the Department is the only person authorized to withdraw money from the retirement account.

The aspect of this program which gives rise to this case is that women employees are required to contribute approximately 15% more than men employees who are identically situated. The Department's justification is that because women get the same monthly benefits upon retiring and because, on the average, they live approximately five years longer, they must, as a group, contribute more.

In June of 1973, the International Brotherhood of Electrical Workers, Local #18, representing the named plaintiffs, filed a charge with the Equal Employment Opportunity Commission [EEOC] alleging that the higher contribution requirement for women was sex discrimination in violation of the Civil Rights Acts of 1871 and 1964. The United States Department of Justice issued a Notice of Right to Sue letter in September of 1973, and this action was filed during that same month.

In their second amended complaint, filed on July 18, 1974, the plaintiffs stated four separate claims for relief, each of which, however, was based upon the same set of facts. The first claim was based upon Title VII, the second upon the Civil Rights Act of 1871, 42 U.S.C. § 1983, the third upon the Fourteenth Amendment to the Constitution, and the fourth, a pendent claim, upon Article 1, §§ 1 and 21, of the Constitution of California.

The plaintiffs' first amended complaint had also asserted claims resting on the same four theories, but had not set them up as separate claims. On March 26, 1974, the court granted in part and denied in part the defendants' motion to dismiss. It granted the motion of the Department, the two boards, and their members in their capacities as members, to dismiss the claim that was based upon 42 U.S.C. § 1983, on the ground that the Department and the Board are not "persons" within the meaning of that section. It denied the motion of the Board members in their individual capacities to dismiss the § 1983 claim, holding that they are "persons," and that they are not immune from suit under § 1983. It granted the motion

of all defendants to dismiss the § 1983 claim insofar as any of it accrued more than three years before the action was filed on September 26, 1973. It denied the motion to dismiss the Title VII claim, except that it granted the motion as to any claim arising before March 24, 1972. It dismissed the claim under the California Constitution. It did not rule on the claim under the Fourteenth Amendment. And it allowed 20 days for the filing of a second amended complaint. After the second amended complaint was filed, no motion was made by any of the defendants to strike or otherwise dispose of those of the allegations that were inconsistent with the court's order of March 26, 1974.

On June 20, 1975, the court granted the plaintiffs' motion for summary judgment, holding that the plan violated Title VII. On the same day it entered a judgment, declaring that the plan, insofar as it requires larger contributions from female employees than from their male counterparts, violates Title VII, and specifically § 701(a)(1) (42 U.S.C. § 2000e-2(a)). The judgment also enjoins requiring larger contributions from females and orders that the Department refund the excess contributions collected on and after April 5, 1972, plus interest at 7%, and that defendants pay counsel for plaintiffs' reasonable attorneys' fees. The judgment says nothing about the claims based on § 1983, the Fourteenth Amendment, or the California Constitution.

On July 7, 1975, the defendants appealed from the judgment. This appeal is our No. 75-2729. On July 11, 1975, the plaintiffs appealed from "that portion of the judgment . . . which denies relief to the plaintiffs

based on the causes of action and defendants dismissed by the Court in its Order Granting and Denying in Part Defendants Motion to Dismiss, entered on or about March 26, 1974." This appeal is our No. 75-2807. On July 17, the district judge denied a motion by the defendants for a stay of the judgment. They appealed on July 30, 1975. This is our No. 75-2905. We later entered an order staying the judgment pending appeal, insofar as it requires the refund of contributions.

After oral argument before us, and in response to an inquiry from the bench, counsel for plaintiffs stipulated, and we ordered, that the plaintiffs "have heretofore abandoned all claims under 42 U.S.C. § 1983 against individual officials in their individual capacities."

I. *Our Jurisdiction.*

A. *No. 75-2729.*

The judgment of June 20, 1975, embodies an injunction against requiring larger contributions from women than from men, and requiring restitution of excess contributions previously paid. As an injunction, it is appealable under 28 U.S.C. § 1292(a)(1). It is not appealable as a final judgment under 28 U.S.C. § 1291. It does not dispose of any claim except the claim under Title VII. It runs only against the defendants, the Department, the two Boards, and their members as such, but not the defendant members individually. It says nothing about the claims or defendants dismissed in the district court's order of March 26, 1974. There is no "express determination that there is no just reason for delay" nor "express direction for the entry of judgment." (F. R. Civ. P. 54(b)).

B. *No. 75-2807.*

We have no jurisdiction of this appeal. The judgment does not do what the notice of appeal says that it does. The order of March 26, 1974, was interlocutory. It did not purport to determine any issue finally. It permitted amendment of the complaint, and the amendment restated, separately, all of the claims asserted but commingled in the original complaint. The plaintiffs were entitled to amend as they did, and the defendants, to protect their record, should have called to the attention of the court the fact that the amended complaint did not fully comply with the court's order of March 26, 1974. The court was not required to reconsider that order but the defendants should have at least suggested that it embody in its subsequent judgment the decision that it made in its March 26, 1974, order, thus disposing of the plaintiffs' claims. The claims remain pending because the judgment does not dispose of them. We have no jurisdiction in No. 75-2807.

It is no answer to say that the plaintiffs have voluntarily abandoned their claims under 42 U.S.C. § 1983 against the individual defendants. That abandonment binds the plaintiffs, but it does not affect their claims against the Department and its Boards and their members and employees in their official capacities under § 1983. Those claims are still pending in the district court and are not properly before us.

C. *No. 75-2905.*

Because we have granted a stay, and because we are now affirming the judgment in No. 75-2729, this appeal is moot.

II. *The Merits of the Judgment.*

The basis of the defendants' appeal is that, while requiring women to make larger contributions discriminates against women, there is a sound basis for the requirement, making it a discrimination based on longevity, not sex, and therefore not the kind of invidious discrimination that Title VII was intended to abolish. We disagree.

It is undisputed that the overriding purpose of Title VII is to require employers to treat each employee (or prospective employee) as an individual, and to make job related decisions about each employee on the basis of relevant individual characteristics, so that the employee's membership in a racial, ethnic, religious, or sexual group is irrelevant to the decisions. *See Griggs v. Duke Power Co.,* 1971, 401 U.S. 424, 436. To require every individual woman to contribute 15% more into the retirement fund than her male counterpart must contribute because women "on the average" live longer than men is just the kind of abstract generalization, applied to individual women because of their being women, which Title VII was designed to abolish. Not all women live longer than all men, yet each individual woman is required to contribute more, not because she as an individual will live longer, but because the members of her sexual group, on the average, live longer.

The Department argues, however, that Congress did not intend Title VII to prohibit drawing sexual distinctions when there is a statistically valid basis for doing so and when it is impossible to determine ahead of time when the individual employee is going to die. Thus it is argued that, because it is undisputed that

women on the average do live longer, and because it is not possible to predict which women will actually live longer, Title VII ought to permit a higher contribution requirement for all women.

The problem raised by this case is unique. There have been two basic policies which have guided the courts in prior Title VII litigation: (1) the policy against attributing general group characteristics to each individual member of the group, the major thrust of the statute, and (2) the policy allowing relevant employment factors to be considered in differentiating among individuals. *See* Bernstein & Williams, *Title VII and the Problem of Sex Classifications in Pension Programs,* 74 *Col. L. Rev.* 1203, 1219 (1974). Heretofore, these two policies have not conflicted because in cases where general group characteristics were attributed to the individual employee, the relevant employment characteristics were capable of being individually measured. *Id.* at 1220. For example, in *Rosenfeld v. So. Pacific Co.,* 9 Cir., 1971, 444 F.2d 1219, we held that refusing to hire women for positions which entailed long hours and heavy physical effort violated Title VII because it entailed attributing the generally weaker physique of women to all women. An important basis of our decision was the fact that each individual woman applicant could actually be tested to see whether the relevant characteristic of strength was or was not in fact lacking.

This same consideration has been present in cases finding illegal: (1) the refusal to allow women to work overtime because of a belief that women as a group cannot work the long hours that men can, *Schaeffer v. San Diego Yellow Cabs, Inc.,* 9 Cir.,

1972, 462 F.2d 1002; (2) the forced retirement of all women at an earlier age than men because of a belief that; on the average, men were capable of adequate performance longer than women, *Rosen v. Public Service Electric and Gas Co.,* 3 Cir., 1973, 477 F.2d 90, *Bartmess v. Drewrys U.S.A., Inc.,* 7 Cir., 1971, 444 F.2d 1186; (3) the termination of women employees who married because of a belief that, on the average, women could not work effectively and keep an adequate home life, *Sprogis v. United Air Lines, Inc.,* 7 Cir., 1971, 444 F.2d 1194; (4) the refusal to hire men as flight attendants because men, on the average, are said to be emotionally unsuited for that type of work, *Diaz v. Pan Am. World Airways, Inc.,* 5 Cir., 1971, 442 F.2d 385; (5) the refusal to hire women as telephone switchmen because of a belief that, on the average, women are incapable of working the long hours and doing the leavy lifting involved, *Weeks v. Southern Bell Telephone & Telegraph Co.,* 5 Cir., 1969, 408 F.2d 228; (6) requiring pregnant women to take mandatory leave after six months of pregnancy because, on the average, pregnant women are supposed to be incapable of working adequately after that point, *Berg v. Richmond Unified School Dist.,* 9 Cir., 1975, 528 F.2d 1208; (7) the refusal to hire women with preschool children because of a belief that family responsibilities would interfere with their job performance, *Phillips v. Martin Marietta Corp.,* 1971, 400 U.S. 542.

In the present case a relevant characteristic in determining how large an individual's retirement contribution should be is an informed prediction as to how long the person will live. But this characteristic, unlike those

in the prior cases, is impossible to determine on an individual basis at the time when the contribution must be made. Thus, the policy of allowing relevant factors to be considered can be met only by allowing the group longevity statistics to be attributed to the individual members of the group. Yet this is exactly what the thrust of Title VII prohibits. We are therefore faced with the unique case in which the policy against per se discrimination directly conflicts with the policy of allowing relevant factors to be considered.

To support its argument that the actuarial distinctions are permitted under Title VII, the Department points to both the "bona fide occupational qualification exception" in 42 U.S.C. § 2000e-2(e) and the Bennett Amendment to Title VII, 42 U.S.C. § 2000e-2(h). Reconciliation of the conflicting policies noted above would be easy if Congress had specifically covered the kind of actuarial distinction that is before us in one of the exceptions which the Department cites. Both, however, are very general and have no language relating to actuarially determined discrimination, much less to pension plans.

A. *The Bona Fide Occupational Qualification [BFOQ] Exception.*

Title 42 U.S.C. § 2000e-2(e) states that an employer may discriminate on the basis of religion, sex, or national origin "where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." EEOC, which is charged with administering and enforcing Title VII and whose interpretations of that statute are entitled to great deference,

Griggs v. Duke Power Co., supra, 401 U.S. at 433-34; *Hutchinson v. Lake Oswego School Dist. #7,* 9 Cir., 1975, 519 F.2d 961, 965, has issued guidelines directing that the BFOQ exception "be interpreted narrowly." 29 C.F.R. § 1604.2(a). In one of the few cases ruling on this exception, the Fifth Circuit has said:

> the use of the word "necessary" in [§ 2000e-2(e)] requires that we apply a business *necessity* test, not a business *convenience* test. That is to say, discrimination based on sex is valid only when the *essence* of the business operation would be undermined. . . .
>
> *Diaz v. Pan Am. World Airways, Inc., supra,* 442 F.2d at 388 [italics in original].

See also Weeks v. Southern Bell Telephone & Telegraph Co., supra, 408 F.2d at 232.

Discriminating against women in setting the amount of retirement contributions in no way affects the ability of the Department to provide water and power to the citizens of Los Angeles. Even if it could be said that the relevant business function here involved is that of providing employees with a stable and secure pension program there is no showing that sexual discrimination is necessary to protect the essence of that function. Actuarial distinctions arguably enhance the ability of the employer and the pension administrators to predict costs and benefits more accurately, but it cannot be said that providing a financially sound pension plan requires an actuarial classification based wholly on sex. This is especially true when distinctions based on many other longevity factors (*e.g.*, smoking and drinking habits, normality of weight, prior medical

history, family longevity history) are not used in determining contribution levels. Thus, we find that the BFOQ exception does not permit the sexual classification challenged in this case.

B. *The Bennett Amendment.*

In its original proposed form, 42 U.S.C. § 2000e-2(h) stated that discrimination among employees was permitted if based on a bona fide seniority or merit system, a system rewarding quantity or quality of production, different work locations, or professionally developed ability tests. Because the inclusion of "sex" as one of the categories of discrimination made illegal by Title VII was done by last minute amendment, received almost no attention, and produced no legislative history, *see* 110 Cong. Rec. 2720 (Rep. Green's remarks, Feb. 10, 1964); Berstein & Williams, *supra,* 74 *Col. L. Rev.* at 1216-17, Senator Bennett became concerned that the Act might inadvertently conflict with the Equal Pay Act of 1963, which had received careful attention the year before. Therefore, he proposed, and Congress approved, an amendment to § 2000e-2(h), which reads:

> It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29 [the Equal Pay Act].

Title 29 U.S.C. § 206(d)(1), which was thus incorporated into the Civil Rights Act of 1964 by the Bennett Amendment, says that it shall be unlawful to discriminate on the basis of sex in paying wages:

> except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.

It is exception iv which the Department says permits the kind of actuarially based discrimination that is in question here. However, it does not seem reasonable to us to say that an actuarial distinction based entirely on sex is "based on any other factor other than sex." Sex is exactly what it is based on.

Additionally, the legislative history of the Equal Pay Act indicates that the general language of § 206(d)(1) was not intended to exempt pension plans, or any actuarially based employee program, from its coverage. The House Committee on Education and Labor, which reported out the Equal Pay Act, commented on the exceptions as follows:

> Three specific exceptions and one broad general exception are also listed. It is the intent of this committee that any discrimination based upon any of these exceptions shall be exempted from the operation of this statute. As it is impossible to list each and every exception, the broad general exclusion has been also included. Thus, among other things, shift differentials, restrictions on or differences based on time of day worked, hours of work, lifting or moving heavy objects, differences based on experience, training, or ability would also be excluded. It also recognizes certain special circumstances, such as "red circle rates." This term is borrowed from War Labor Board parlance and describes certain unusual, higher than

normal wage rates which are maintained for many valid reasons. For instance, it is not uncommon for an employer who must reduce help in a skilled job to transfer employees to other less demanding jobs but to continue to pay them a premium rate in order to have them available when they are again needed for their former jobs. House Report #309 to accompany H.R. 6060, May 20, 1963, Committee on Labor and Education, reprinted in 1963 *U.S. Code Cong. & Admin. News* 687, 689 (88th Cong., 1st sess.).

This is the only legislative history coming from the House concerning the exceptions upon which the Department relies. It seems clear that, at least in the House, exception iv was seen only as a catch-all category which would permit distinctions similar to those based on seniority, merit, or production but which do not literally fall into any of those categories, and not a disguised grant of legitimacy for pension plan discrimination based on sex.[2]

The report of the Senate Committee on Labor and Public Welfare indicates that, unlike the House committee, the Senate committee did specifically consider how pension and insurance plans would fit into the scheme of the Equal Pay Act. It commented:

> Furthermore, questions can legitimately be raised as to the accuracy of defining such costs as pension and welfare payments as related to sex. It has

[2]It is especially significant that the Committee made no mention of pension plans, because the problem was specifically brought to its attention during the hearings conducted on the Equal Pay Act. Hearings before the House Special Subcommittee on Education & Labor, 88th Cong., 1st sess., 1963 (Equal Pay Act, H.R. 3861) at p. 103.

> been pointed out that the higher susceptibility of men to disabling injury can result in a greater cost to the employer, and that these figures as to health and welfare costs can only be applied plant-wide. It may be that it is more expensive to hire women in one department but it is more expensive to hire men in another, and overall cost figures may demonstrate conclusively that the employer has made a sound decision to hire women and pay them on an equal basis.
>
> It is the intention of the committee that where it can be shown that, on the basis of all of the elements of the employment costs of both men and women, an employer will be economically penalized by the elimination of a wage differential, the Secretary can permit an exception similar to those he can permit for a bona fide seniority system or other exception mentioned above.
>
> Senate Report #176 to accompany S. 1409, May 13, 1963, Committee on Labor and Public Welfare, at p. 4 (88th Cong., 1st sess.).

This seems to indicate that the Senate had a broader view of exception iv than did the House in that, when an employer can demonstrate that he incurs significant costs because of employing a particular sex, exception iv would allow the Secretary of Labor, through the Wage-Hour Administrator, to grant an exception from the provisions of the Act.

However, in this case there is nothing in the record to show, and the Department does not claim, that it requires higher contributions from women because it would be economically penalized if it did not; it

requires the higher contributions only because it believes that the pension fund itself will thereby be better funded and easier to administer. Thus, whatever the Senate committee had in mind about the Equal Pay Act, it would not, when grafted onto the provisions of Title VII, be the kind of broad exception to the rule against per se discrimination which the Department needs to justify the contribution rate differential here involved. Neither the clear language of the statute, § 206(d)(1), nor the legislaive history supports the Department's position.

Nonetheless, the Department points to a dialogue between Senator Humphrey, the floor manager of the 1964 Civil Rights Act, and Senator Randolph, which occurred during the floor debate on the 1964 Act (not the Equal Pay Act) and Title VII.

> SEN. RANDOLPH: Mr. President, I wish to ask of the Senator from Minnesota [Mr. Humphrey], who is the effective manager of the pending bill, a clarifying question on the provisions of title VII.
>
> I have in mind that the social security system, in certain respects, treats men and women differently. For example, widows' benefits are paid automatically; but a widower qualifies only if he is disabled or if he was actually supported by his deceased wife. Also, the wife of a retired employee entitled to social security receives an additional old age benefit; but the husband of such an employee does not. These differences in treatment as I recall, are of long standing. Am I correct, I ask the Senator from Minnesota, in assuming that similar differences of treatment in industrial benefit plans, including earlier retirement options

> for women, may continue in operation under this bill, if it becomes law?
>
> SEN. HUMPHREY: Yes. That point was made unmistakably clear earlier today by the adoption of the Bennett amendment; so there can be no doubt about it.
>
> 110 Cong. Rec. 13663-64, June 12, 1964.

Although this does seem to give support to the Department's position, we do not find it to be persuasive legislative history. The discussion occurred hours after passage of the Bennett Amendment and cannot be said to be part of the legislative history of that amendment. The Department claims that although the statement was made after the Bennett Amendment was adopted, it was still made before the Senate voted on the entire Civil Rights Act. Thus, it claims that Senator Randolph and others who may have wanted to preserve such distinctions were misled into not offering a further amendment for that purpose. This argument might have some merit were it not for the fact that the same Congress (the 88th) passed both the Civil Rights Act and the Equal Pay Act, and it seems unlikely that Senator Humphrey's erroneous interpretation of the latter misled many, if any, senators. It certainly misled no members of the House. So far as appears, members of the House never heard of it.

We note, too, that every case that has considered whether sex-based early retirement options violate Title VII has held that they do, although it does not appear that the colloquy between Senators Randolph and Humphrey was called to the attention of the courts. ***See Chastang v. Flynn and Emrich Co.***, 4 Cir., 1976, ... F.2d .... (slip op. June 10, 1976); ***Rosen v. Public***

Service Electric & Gas Co., supra; Bartmess v. Drewrys U.S.A., Inc., supra; Fitzpatrick v. Bitzer, D. Conn., 1974, 390 F. Supp. 278, 287-88, *aff'd,* 2 Cir., 1975, 519 F.2d 559, *rev'd on other grounds,* 1976, ... U.S. ..... *See also Peters v. Missouri Pacific R. Co.,* 5 Cir., 1973, 483 F.2d 490, 492, n.3.

As we have noted, Senator Humphrey's remark reflects an erroneous interpretation of the Equal Pay Act. Because all that the Bennett Amendment did was to incorporate the exemptions of the Equal Pay Act into Title VII, it is questionable whether the Senator's statement, made during the debates on the incorporating statute, would be significant when it erroneously interprets the incorporated statute.

The Department cites as additional authority interpretations of the Equal Pay Act by the Administrator of the Wage and Hour Division of the Department of Labor. As the official charged with enforcing and interpreting the Equal Pay Act, his interpretations of that Act are entitled to great deference. *Udall v. Talman,* 1965, 380 U.S. 1. However, the interpretation relied on by the Department, appearing at 29 C.F.R. § 800.116(d), merely states that in providing benefit plans for employees through outside insurers an employer does not violate the Equal Pay Act if either the amount contributed by the employer for each employee is the same and resulting benefits are different or if the amount of the benefit is the same while the employer contributions differ. While this reflects the Wage-Hour Administrator's general thinking, it does not deal directly with our case of an employer requiring greater pension plan contributions from women employees when the plan is funded and administered by the employer and its employees.

We note, too, that to the extent that the Wage-Hour Administrator's interpretation does deal with the present case, his interpretation conflicts with that of EEOC, which administers Title VII and whose interpretations of Title VII must be given great deference. Therefore, the EEOC interpretations of the Bennett Amendment are worthy of more deference than are those of the Wage-Hour Administrator relating to the Equal Pay Act. The EEOC regulation, 29 C.F.R. § 1604.9(e & f), makes it a violation of Title VII where a benefit plan provides unequal benefits to employees even if employer contributions are equal. However, like the Wage-Hour Administrator's, these regulations do not squarely cover the present case. Thus, the Department's reliance on administrative interpretation is misplaced.

Our opinion of the effect of Title VII in this case is reinforced by the fact that following the passage of Title VII Congress did expressly exempt actuarially based pension and retirement funds from the provisions of the Age Discrimination Act of 1967, 29 U.S.C. § 623(f)(2). In fact, during deliberations on the 1964 Civil Rights Act, Senator Smathers moved to add "age" as one of the types of discrimination made illegal by Title VII, but the amendment was defeated in part because of a concern that inclusion of "age" as a Title VII protected category might have "tremendous implications" on industrial group insurance and pensions. *Equal Employment Opportunity Commission, Legislative History of Titles VII and IX of Civil Rights Act of 1964,* at 3174 (1968). This tends to indicate that Congress did foresee that actuarially based plans would fall under the provisions of Title VII, and that it felt that age discrimination, but not

sex discrimination, on such a basis was proper. Thus, by not adding "age" to Title VII in 1964 and not making a pension plan exception to its terms for "sex," and by later prohibiting age discrimination in a separate bill which does make a pension plan exception to its terms for age, Congress gave a strong indication that it did intend to place sex discrimination in pension and retirement plans, even when based on actuarially sound tables, within the type of discrimination forbidden by Title VII.

We emphasize that our holding rests on the clear policy behind Title VII of requiring that each employee be treated as an individual. Setting retirement contribution rates solely on the basis of sex is a failure to treat each employee as an individual; it treats each employee only as a member of one sex. We do not pass judgment on the legality of a plan which determines contribution rates based on a significant number of actuarially determined characteristics, one of which is sex. Our holding is limited to the proposition that when sex is singled out as the only, or as a predominant, factor, the employee is being treated in the manner which Title VII forbids.

One district court case has dealt with a situation very similar to ours. In *Henderson v. Oregon,* D. Ore., 1975, 405 F. Supp. 1271, the court relied heavily on the lower court decision in the present case in holding a scheme similar to that involved here illegal under Title VII.

Our holding agrees with the only administrative ruling dealing with the exact question before us, one made by the EEOC, EEOC Dec. #75-146, Jan. 13, 1975, 2 *CCH Employment Practices* 4190, ¶ 6447.

Relying in part on its earlier interpretation, noted *supra,* the Commission held:

> An inescapable corollary to this principle is that an employer may not require a higher contribution from members of one sex where benefits to members of both sexes are the same.
>
> [This] is based upon the fundamental Title VII precept that generalizations relating to sex, race, religion, and national origin cannot be permitted to influence the terms and conditions of an *individual's* employment, even where the generalizations are statistically valid.

III. *The Reimbursement Issue.*

The Department finally argues that even if the higher contribution required of women violates Title VII, it would be unfair to refund to the plaintiffs the amounts that they contributed in excess of the amounts that similarly situated male employees contributed. The Department says that it was acting in good faith in that it believed that state law requiring that retirement plans be run on a "sound actuarial basis" (Cal. Gov't Code § 45342) mandated the use of sex-based actuarial tables, and that paying these contributions back to the women employees would leave the retirement plan underfunded.

The rule that we have adopted relating to monetary awards for past violations of Title VII is stated in *Schaeffer v. San Diego Yellow Cabs, Inc.,* 9 Cir., 1972, 462 F.2d 1002.

> In the case of damages of this nature, a court must balance the various equities between the parties and decide upon a result which is consistent

> with the purposes of the Equal Employment Opportunities Act, and the fundamental concepts of fairness. *Id.* at 1006.

The defendant in *Schaeffer* argued that in denying women overtime work it has relied in good faith on a state statute requiring that women not work more than eight hours a day, and that therefore it was unfair to make it pay damages for an unwitting violation. We rejected that defense with the following comment:

> Rather than drawing any hard and fast rule concerning the defense of good faith reliance on a state statute, we believe that in each case the merits of the plaintiff's claim and the public policy behind it must be balanced against the hardship on a good faith employer. *Id.* at 1007.

Applying this test to the case at bar, we find that the district court did not abuse its discretion in awarding plaintiffs a refund of their excess contributions.

In the first place, the state statute requiring that such plans be administered on a sound actuarial basis by no means requires that the Department use sex-based, and only sex-based, distinctions. In *Schaeffer*, where we found a back pay award proper, the statute prohibiting women from working more than eight hours a day placed a much greater compulsion on the employer to refuse women overtime work than the statute in the present case placed on the Department to require higher retirement contributions.

Second, *Schaeffer* was a case where back pay was awarded to women for work that they did not perform but which they had sought. The plaintiffs did not

earn the award; they were merely denied the opportunity to earn it. This case involves *restitution*, a situation where the plaintiffs actually earned the amount in question, but then had it taken from them in violation of Title VII. It is one of the primary purposes of Title VII, to "make persons whole for injuries suffered on account of unlawful employment discrimination." *Albemarle Paper Co. v. Moody*, 1975, 422 U.S. 405, 418. In light of this purpose we find plaintiffs' claim to recover money rightfully theirs to be very compelling.

In contrast to the plaintiffs' compelling claim, we find the Department's "good faith" defense to be less than compelling. The Supreme Court has recently commented on this "good faith" defense as follows:

> But, under Title VII, the mere absence of bad faith simply opens the door to equity; it does not depress the scales in the employer's favor. If backpay were awardable only upon a showing of bad faith, the remedy would become a punishment for moral turpitude, rather than a compensation for workers' injuries. This would read the "make whole" purpose right out of Title VII, for a worker's injury is no less real simply because his employer did not inflict it in "bad faith." *Albemarle Paper Co. v. Moody, supra,* 422 U.S. at 422.

The impact of returning the excess contributions to the plaintiffs in this case is far from oppressive. The amount involved is only 15% of the contributions made by a minority of the Department's employees for the 33-month period from April 5, 1972, to December 31, 1974. This might leave the plan somewhat underfunded, but a number of solutions to that problem

are readily available. Benefits could be lowered. Current contributions from all employees could be increased. The Department could raise its matching percentage on current contributions, or it could make a lump sum payment into the fund to offset the reimbursements. However, whatever the adjustments that would have to be made, we do not find that the burden on the pension plan or the Department is sufficient to offset the compelling claim of the plaintiffs to recover the money which they were wrongfully required to contribute. *See also Rosen v. Public Service Electric and Gas Co., supra,* 477 F.2d at 95-96.

In No. 75-2729, the judgment is affirmed.

In No. 75-2807, the appeal is dismissed.

In No. 75-2905, the appeal is dismissed as moot. The stay heretofore granted by this court will expire when the mandate issues.

APPENDIX D.

Marie MANHART et al., Plaintiffs-Appellees,

v.

CITY OF LOS ANGELES, DEPARTMENT OF WATER AND POWER, a body corporate and politic, et al., Defendants-Appellants.

Nos. 75-2729, 75-2807 and 75-2905.

United States Court of Appeals, Ninth Circuit.

April 18, 1977.

Suit was brought challenging retirement plan which required women employees to contribute from their wages 15% more than similarly situated male employees because of the longer average life expectancy of women. On motion for summary judgment, the United States District Court for the Central District of California, Harry Pregerson, J., held that the plan violated Title VII of the Civil Rights Act of 1964, enjoined the municipal employer from charging the higher contribution rate against women, awarded a refund of all excess contributions made on or after April 5, 1972, and the defendants appealed. The Court of Appeals, Duniway, Circuit Judge, held, inter alia, that the retirement plan was violative of Title VII, notwithstanding defendants' claim that the discrimination was based on longevity, not sex, and was not the kind of invidious discrimination that Title VII intended to abolish. On petition for rehearing, the Court of Appeals, Duniway, Circuit Judge, held that the Supreme Court's recent "General Electric" decision, which held that the exclusion of pregnancy from a program of disability insurance is not discrimination based on sex as such, did not require a change in the judgment entered.

Petition for rehearing denied.

Kilkenny, Circuit Judge, filed a dissenting opinion.

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Court of Appeals' prior determination that retirement plan, which required women employees to contribute from their wages 15% more than similarly situated male employees, violated Title VII of the Civil Rights Act of 1964 was not affected by Supreme Court's recent "General Electric" decision, which held that the exclusion of pregnancy from a program of disability insurance is not discrimination based on sex as such, since the pension plan in question was clearly discriminatory on the basis of sex, since, unlike the situation in "General Electric," the plan was facially discriminatory, and since, again unlike the "General Electric" situation, there were no inconsistent administrative rulings.

On Petition for Rehearing.

Before CHAMBERS, DUNIWAY and KILKENNY, Circuit Judges.

DUNIWAY, Circuit Judge:

Appellants petition for a rehearing and suggest a rehearing *in banc*. Their principal reliance is upon the decision of the Supreme Court in *General Electric Co. v. Gilbert*, 1976, — U.S. ——, 97 S.Ct. 401, 50 L.Ed.2d 343, which was decided on December 7, 1976, just two weeks after our decision was filed on November 23, 1976. We conclude that the *General Electric* case does not require a change in our judgment, for several reasons.

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First, in that case, as in *Geduldig v. Aiello*, 1974, 417 U.S. 484, 94 S.Ct. 2485, 41 L.Ed.2d 256, upon which the Court primarily relied, the facts were different from the facts in the case at bar. In each of those cases, a program of disability insurance was involved, and in each pregnancy was excluded as a disability. The Court held that the exclusion was not a discrimination based upon gender as such. It pointed out that the exclusion of pregnancy as a disability "divides potential recipients [of benefits] into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes." *General Electric, supra*, — U.S. at ——, 97 S.Ct. at 407, quoting from *Geduldig, supra*, 417 U.S. at 496–97, n. 20, 94 S.Ct. 2485. Thus, said the Court, the exclusion of pregnancy "was not in itself discrimination based on sex," — U.S. ——, at ——, 97 S.Ct. 401, at 407.

The same cannot be said of the pension plan of the Department in the case at bar. A greater amount is deducted from the wages of every woman employee than from the wages of every man employee whose rate of pay is the same. How can it possibly be said that this discrimination is not based on sex? It is based upon a presumed characteristic of women as a whole, longevity, and it disregards every other factor that is known to affect longevity. The higher contribution is required specifically and only from women as distinguished from men. To say that the difference is not based on sex is to play with words.

In addition, as the Court pointed out in *General Electric*, under the disability programs in that case and in *Geduldig*, "The 'package' going to relevant identifiable groups . . .—male and female employees—covers exactly the same categories of risk, and is facially nondiscriminatory in the sense that '[t]here is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not.' *Geduldig*, 417 U.S. at 496–97, 94 S.Ct. at 2492" *General Electric*, — U.S. ——, p. ——, 97 S.Ct. 401, p. 409. "[G]ender-based discrimination does not result simply because an employer's disability benefits plan is less than all inclusive." *Id.* at ——, 97 S.Ct. at 409 (footnote omitted).

The pension plan in the case at bar is different. The monthly benefit is the same for men and for women, but the cost to women is higher than the cost to men, and this is solely because they are women. Thus the plan is facially discriminatory because, while the plan is all inclusive as to retirement benefits, it is discriminatory, on the basis of sex alone, as to costs to the employees.

Finally the Court's opinion in *General Electric* requires that we reconsider our analysis of the legislative history of the Bennett Amendment (see part II. B. of our opinion). However, upon that reconsideration, we conclude that a different result is not required in this case. Appellants stress the Court's reliance, in *General Electric*, upon the colloquy between Senators Humphrey and Randolph, discussed in *General Electric* at — U.S. ——, at ——, 97 S.Ct. 401 at 412, and in our opinion at —— – —— (slip op. at 12–13). We did not find it to be persuasive legislative history; the Supreme Court did find it persuasive. We are, of course, bound by that conclusion, but we do not think that it follows that the judgment in this case is erroneous.

In *General Electric*, the Court relied also, and, we think, more heavily, on rulings of the Wage and Hour Administrator construing the Equal Pay Act, and

on the fact that EEOC rulings were inconsistent with each other as well as with the rulings of the Administrator (— U.S. ——, at —— – ——, 97 S.Ct. 401 at 411–412). In our case, there are no such inconsistencies.

In his brief as amicus curiae in this case, the Secretary of Labor points out that he (or the Administrator acting for him) "has never approved a practice of requiring women employees to make contributions to a pension plan which are larger than those required of similarly situated men employees." (Brief at 6) The rulings of the Secretary on which the Department relies do not deal with a requirement that female employees must make greater contributions to the plan than male employees, a requirement which diminishes the current available or "take home" wages of women, as compared to those of men.

In his June 18, 1964 opinion letter (BNA's WHM 95:607), the Administrator disapproved of a wage differential between men and women based upon alleged higher costs of employing women, a part of those costs being for pensions. In an Interpretive Bulletin issued February 11, 1966 (3 F.R. 2657, 29 C.F.R. § 800.151), the Administrator said:

> A wage differential based on claimed differences between the average cost of employing the employer's women workers as a group and the average cost of employing the men workers as a group does not qualify as a differential based on any "factor other than sex," and would result in a violation of the equal pay provisions, if the equal pay standard otherwise applies. To group employees solely on the basis of sex for purposes of comparison of costs necessarily rests on the assumption that the sex factor alone may justify the wage differential—an assumption plainly contrary to the terms and purposes of the Equal Pay Act. Wage differentials so based would serve only to perpetuate and promote the very discrimination at which the Act is directed, because in any grouping by sex of the employees to which the cost data relates, the group cost experience is necessarily assessed against an individual of one sex without regard to whether it costs an employer more or less to employ such individual than a particular individual of the opposite sex under similar working conditions in jobs requiring equal skill, effort, and responsibility.

There are no rulings of the Secretary or Administrator inconsistent with this. The one which the Department cites, issued September 9, 1965, and amended May 6, 1966, 30 F.R. 11504 and 31 F.R. 6770, 29 C.F.R. § 800.116(d) deals with employer contributions, not compulsory employee contributions which are here involved, and which, under 29 C.F.R. § 800.151 cannot be unequal.

No ruling of EEOC conflicts with 29 C.F.R. § 800.151. Nor has EEOC taken inconsistent positions in relation to the problem before us. Its position is stated in 29 C.F.R. § 1604.9, issued April 5, 1972, 37 F.R. 6836, and in EEOC Dec. # 75–146 of Jan. 13, 1975, 2 *CCH Employment Practices* 4190, ¶ 6447, both discussed in our opinion. We know of no prior inconsistent rulings. Thus this case is quite unlike *General Electric*, where there was conflict between EEOC rulings and between rulings of EEOC and those of the Secretary of Labor. Here, the administrative rulings, as they relate to the problem before us, are consistent and support the result that we have reached.

The petition for a rehearing is denied. The suggestion of a rehearing *in banc*

has been transmitted to all judges of the court, and no judge has requested a vote on the suggestion. Rule 35(b) F.R. App.P. The suggestion of a rehearing *in banc* is rejected.

KILKENNY, Circuit Judge, dissenting:

I share the views of the majority on the jurisdictional issues, but have serious reservations with respect to the manner in which the majority disposes of the appellants' claims in No. 75–2729. In my opinion, they should have been allowed to prove their case.

I am convinced that the legal principles enunciated in *General Electric Co. v. Gilbert*, —— U.S. ——, 97 S.Ct. 401, 50 L.Ed.2d 343 (1976), are here controlling and that the district court erred in granting a summary judgment against the appellants. At a minimum, the court should have conducted a trial on the issue of whether the appellants' retirement plan was justified on the basis of recognized actuarial tables showing the difference in longevity between males and females. As it now stands, the lower court here made the same mistake as the district court in *General Electric* in its refusal to consider any cost differential defense. As stated by the Supreme Court:

> "The District Court was wrong in assuming, as it did, 375 F.Supp., at 383, that Title VII's ban on employment discrimination necessarily means that 'greater economic benefit[s]' must be required to be paid to one sex or the other because of their differing roles in 'the scheme of human existence.'" *General Electric* at ——, 97 S.Ct. at 410, n. 17.[1]

The uncontroverted affidavits in the record before the district court and now before us show clearly that women live substantially longer than men and that the higher female contribution [approximately 15% more than male employees] is fully justified on an actuarial basis. These affidavits further show that this plan, like all annuity plans, is based upon the life expectancy of its beneficiaries, and that mortality tables in use throughout the western commercial world separate male mortality rates from female mortality rates. Moreover, one affiant states that the plan before us was adopted as a result of his 1972 study of the mortality rates of the appellants' employees. The plan follows the "1951 Group Annuity Mortality Table" published in the *Transactions of the Society of Actuaries*.

Consistent with all available studies and plans, this particular plan uses separate mortality tables for men and women and was used to determine the total monies that had to be set aside for the lifetime retirement allowances of employees. Many other relevant facts are set forth in these affidavits, including the undisputed statement that no tables have as yet been developed which measure life expectancy on a *unisex* basis, as required by the majority. Furthermore, these affidavits attest to the fact that unisex mortality tables, if developed, could lead to a result which adversely affects the financial integrity of annuity or pension plans such as here before us.

GENERAL ELECTRIC v. GILBERT

Against this background, the majority purports to distinguish *General Electric*. From the general finding in *General Electric* that the exclusion of pregnancy was not in itself discrimination based upon sex, it is apparent to me that the Supreme Court has rejected the broad doctrines espoused by the majority. Moreover, neither *Craig v. Boren*, —— U.S. ——, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976), nor *Califano v. Goldfarb*, —— U.S. ——, 97 S.Ct. 1021, 51 L.Ed.2d —— (1977), detract from what is said in *General Electric*. To summarily conclude, like the majority, that "[t]o say that the difference [here] is not based on sex is to play with words. . . ." is simply an inadequate response to the issues presented. I am of the impression that the majority, rather than the appellants, is playing with words. The appellants' claim deserves more consideration than this conclusory statement.

The majority similarly glosses over the language in *General Electric* regarding the *effect* of the exclusion of pregnancy. The Court recognized that a proper showing of "gender-based effects" may be sufficient to establish a *prima facie* case under Title VII, but it was not there present, and it is not here present.[2] This is made manifest by a comparison of the circumstances here present with those of *General Electric*. As stated in *General Electric:*

> ". . . As in *Geduldig, supra*, [417 U.S. 484, 94 S.Ct. 2485, 41 L.Ed.2d 256 (1974)] *we start from the indisputable baseline that '[t]he fiscal and actuarial benefits of the program . . . accrue to members of both sexes,'* 417 U.S., at 497 n. 20, [94 S.Ct. at 2492]. We need not disturb the findings of the District Court to note that there is neither a finding, nor was there any evidence which would support a finding, that the financial benefits of the Plan '*worked to discriminate against any definable group or class in terms of the aggregate risk protection derived by that group or class from the program,' id.*, at 496 [, 94 S.Ct., at 2492]. The Plan, in effect (and for all that appears), is nothing more than an insurance package, which covers some risks, but excludes others, see *id.*, at 494, 496–497, [94 S.Ct. at 2491–2492]. The 'package' going to relevant identifiable groups we are presently concerned with—General Electric's male and female employees—covers exactly

1. The Supreme Court also noted that the district court ". . . declined to find that the *present actuarial value* of the coverage was equal as between men and women, . . ." *General Electric*, at ——, 97 S.Ct. at 406. [Emphasis Added.]

2. The Court recognized that a proper showing of cause and effect may be sufficient:

> "The instant suit was grounded on Title VII rather than the Equal Protection Clause, and our cases recognize that a prima facie violation of Title VII can be established in some circumstances upon proof that the *effect* of an otherwise facially neutral plan or classification is to discriminate against members of one class or another. See *Washington v. Davis*, [426 U.S. 229,] 96 S.Ct. 2040, 2051, [48 L.Ed.2d 597] (1976). For example, in the context of a challenge, under the provisions of § 703(a)(2), to a facially neutral employment test, this Court held that a prima facie case of discrimination would be established if, even absent proof of intent, the consequences of the test were '*invidiously to discriminate on the basis of racial or other impermissible classification,*' *Griggs v. Duke Power Co.*, 401 U.S. 424, 431, [91 S.Ct. 849, 853, 28 L.Ed.2d 158] (1971). Even assuming that it is not necessary in this case to prove intent to establish a prima facie violation of § 703(a)(1), but cf. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–806 [, 93 S.Ct. 1817, 1824–1826, 36 L.Ed.2d 668] (1973), *the respondents have not made the requisite showing of gender-based effects.*" *General Electric*, —— U.S. at ——–——, 97 S.Ct. at 408–409. [Emphasis Added.] [Footnotes Omitted.]

Footnote 14 on the same page deals with the burden of proof:

> "Respondents, who seek to establish discrimination, *have the traditional civil litigation burden of establishing that the acts they complain of constituted discrimination in violation of Title VII.* . . ." [Emphasis Added.]

the same categories of risk, *and is facially nondiscriminatory in the sense that '[t]here is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not.' Geduldig*, 417 U.S., at 496–497, [94 S.Ct., at 2492]. *As there is no proof that the package is in fact worth more to men than to women, it is impossible to find any gender-based discriminatory effect in this scheme simply because women disabled as a result of pregnancy do not receive benefits; that is to say, gender-based discrimination does not result simply because an employer's disability benefits plan is less than all inclusive.* For all that appears, pregnancy-related disabilities constitute an *additional* risk, unique to women, and the failure to compensate them for this risk does not destroy the presumed parity of the benefits, accruing to men and women alike, which results from the facially evenhanded *inclusion* of risks. To hold otherwise would endanger the common-sense notion that an employer who has no disability benefits program at all does not violate Title VII even though the 'underinclusion' of risks impacts, as a result of pregnancy-related disabilities, more heavily upon one gender than upon the other. Just as there is no facial gender-based discrimination in that case, so, too, there is none here." *General Electric* at ——————, 97 S.Ct. at 409–410. [Emphasis Added.] [Footnotes Omitted.]

Similarly, it is obvious here that the fiscal and actuarial benefits of the plan accrue to the members of both sexes. As in *General Electric*, the plan is facially nondiscriminatory to the extent that there is no risk for which one sex is covered and the other is not. Because of the additional contribution made by both the employer and the women employees, the aggregate risk protection for men and women is identical. As a consequence of objectively identifiable characteristics [reflected in actuarial statistics], this plan impacts more heavily upon women than men. [But women live longer than men and ultimately recover as much if not more.] This was also the case in *General Electric* and the Court there refused to find a Title VII violation. Its reasoning is made abundantly clear in Footnote 17, which reads:

> "Absent proof of different values, the cost to 'insure' against the risks is, in essence, nothing more than extra compensation to the employees, in the form of fringe benefits. If the employer were to remove the insurance fringe benefits and, instead, increase wages by an amount equal to the cost of the 'insurance,' there would clearly be no gender-based discrimination, even though a female employee who wished to purchase disability insurance that covered all risks would have to pay more than would a male employee who purchased identical disability insurance, due to the fact that her insurance had to cover the 'extra' disabilities due to pregnancy. While respondents seem to acknowledge that the failure to provide any benefit plan at all would not constitute sex-based discrimination in violation of Title VII, see note 18, *infra*, they illogically also suggest that the present scheme does violate Title VII because
>
> 'A female must spend her own money to buy a personal disability policy covering pregnancy disability if she wants to be fully insured against a period of disability without income, whereas a male without extra expenditure is fully insured by GE against every period of disability.' Supplemental Brief for Martha Gilbert *et al.* on Reargument, at 11. Yet, in both cases—the instant case and the case where there is no disability coverage at all—the ultimate result is that a woman who wished to be fully insured would have to pay an incremental amount over her male counterpart due solely to the possibility of pregnancy-related disabilities. Title VII's proscription on discrimination does not require, in either case, the employer to pay that incremental amount. . . . " *General Electric* at ——, 97 S.Ct. at 409–410.

In one respect, at least, the present facts are more compelling than those of *General Electric* because the employer here was actually paying more for each female employee than for each male employee. The just quoted language would have allowed the employer/appellants to pay the same amount for each, in which case each female employee would have received less insurance protection than each male employee. If no insurance at all was provided under the plan, each female employee, if she purchased outside insurance, would have to pay more than her male counterpart for the same amount of insurance. In either case, after *General Electric* it is illogical to argue that a Title VII violation would result.

Throughout its opinion, the majority substantially exaggerates the strength of its position. It suggests that the Supreme Court was more concerned with inconsistent administrative interpretations than it was with our original and erroneous view of the legislative history. To support its position, the majority finds that there are no such inconsistencies in the case before us. I disagree.

The Wage and Hour Administrator of the Department of Labor has promulgated a number of regulations. After *General Electric*, I question the vitality of the one quoted by the majority; one [29 CFR § 800.116(d)] noted by the Supreme Court in *General Electric* is more in point. This regulation states

> "*If employer contributions to a plan providing insurance or similar benefits to employees are equal for both men and women, no wage differential prohibited by the equal pay provisions will result from such payments, even though the benefits which accrue to the employees in question are greater for one sex than the other.* The mere fact that the employer may make unequal contributions for employees of opposite sexes in such a situation will not, however, be considered to indicate that the employer's payments are in violation of section 6(d), if the resulting benefits are equal for such employees." [Emphasis Added.]

The majority's tortured views on the obvious breadth of *General Electric* become apparent in its writing around and failure to accept the Supreme Court's application of this regulation. This regulation, as I read it, contemplates the actuarial equivalent of the scheme before us. If employer contributions are equal for men and women, there is no statutory violation even though the resulting benefits are not equal as between men and women. The majority fails to appreciate the significance of this. In the context of pension plans, this rule makes sense only if it is read to impliedly authorize the funding of employee pension plans upon the basis of separate mortality tables. This regulatory justification for a plan with equal contributions and unequal benefits cannot be ignored in the variation before us.

In 1965, the EEOC promulgated regulations under which it agreed to follow

the relevant interpretations of the Wage and Hour Division. 29 CFR § 1604.7(b) provided:

> "*Accordingly, the Commission will make applicable to equal pay complaints filed under Title VII the relevant interpretations of the Administrator, Wage and Hour Division, Department of Labor.* These interpretations are found in 29 Code of Federal Regulations, Part 800.119–800.163. *Relevant opinions of the Administrator interpreting 'the equal pay for the equal work standard' will also be adopted by the Commission.*" 30 F.R. 14928. [Emphasis Added.]

This regulation was maintained until the EEOC repealed it in 1972, 37 F.R. 6836. Now 29 CFR § 1604.8 discusses the applicability of defenses raised under the Equal Pay Act [administered by the Wage and Hour Division] and states that the EEOC will no longer be bound by the interpretations of the Department of Labor, Wage and Hour Division. Moreover, the EEOC in 1972 for the first time revised its regulations to add 29 CFR § 1604.9(f), which provides that:

> "It shall be an unlawful employment practice for an employer to have a pension or retirement plan which establishes different optional or compulsory retirement ages based on sex, *or which differentiates in benefits on the basis of sex.* . . ." [Emphasis Added.]

The majority entirely overlooks the fact that this is inconsistent with prior pronouncements of the EEOC and with the other administrative agencies, including the Department of Labor. Under these circumstances, the most recent EEOC interpretation is entitled to little if any weight. *See General Electric* —— U.S. at ————, 97 S.Ct. at 410–411 where the Court refused to find a Title VII violation even though the employer's plan conflicted with the EEOC regulation. *See also Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 92–6, 94 S.Ct. 334, 38 L.Ed.2d 287 (1973). It is also significant that this most recent EEOC interpretation is in conflict with the legislative history of the Bennett Amendment.

One must sympathize with the plight of the appellants—a plan drawn up to comply with the regulations of the Wage and Hour Division will inevitably conflict with the recent regulations of the EEOC. This typifies the type of "no win" situation alluded to by the Supreme Court in *General Electric* [—— U.S. at ——, 97 S.Ct. at 410, n. 18], and reinforces my conclusion that the discrimination, if any, fostered by this plan is of a type which did not concern Congress when enacting Title VII.[3] Moreover, the

3. As stated in *General Electric* at ——, 97 S.Ct. at 413:

". . . When Congress makes it unlawful for an employer to 'discriminate . . . on the basis of . . . sex . . .', without further explanation of its meaning, we should not readily infer that it meant something different than what the concept of discrimination has traditionally meant, . . ." *Cf. Barker v. Taft Broadcasting Co.*, 549 F.2d 400 (CA6 1977).

I wonder, moreover, whether Congress is even concerned with this kind of thing at the present time. For example, the Agency established by Congress to insure pension plans under ERISA, the Pension Benefit Guaranty Corporation, has already recognized the propriety of using sex segregated actuarial tables. *See* 41 F.R. 48484–48491 (1976) where an interim regulation provides for the use of six such tables in the valuation of plan benefits. Additionally, in view of the lack of any definitive guidelines from the Supreme Court after *General Electric*, it would seem that the majority has gone overboard. Even the tax laws, for example, use sex-segregated actuarial tables in

majority does not come to grips with the very serious ramifications of its decision. Unless and until unisex tables are developed, an employer, to comply with the EEOC regulations on equal benefits, may not charge any additional amount to his female employees. In thus forcing the employer himself to cover the added amount necessary to assure equal benefits, this makes the employment of females economically unattractive, a result clearly at odds with the thrust of Title VII.

I would grant the petition for rehearing, set aside the judgment of the lower court and remand for a trial on the issue of whether the distinctions under the plan are mere pretexts designed to effect an invidious discrimination against the members of the female sex.

the computation of annuity income which results in different periodic taxation burdens as between a man and a woman. See 26 U.S.C. § 72(c)(3)(A); Regs. § 1.72-9.

United States Court of Appeals
Ninth Circuit
The Pioneer Courthouse
Portland, Oregon 97204

Chambers of
John F. Kilkenny
Senior Circuit Judge

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May 3, 1977

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St. Paul, Minnesota 55165

Attention: Mrs. Catherine Gullickson

Dear Mrs. Gullickson:

Re: Manhart v. City of Los Angeles, Dept. of Water & Power, Nos. 75-2729/2807/2905 [CA9, April 18, 1977].

This will confirm telephone conversation of this date whereby we requested the following changes in the above opinion.

(1) Page 706, line 19, column one - Insert a comma between "Now" and "29".

(2) Page 707, line 3, column one - Underscore the words "Unless and until".

(3) Page 707, line 10, column two - Add footnote 4/ following the word "sex." as follows:

"4/ For that matter, the available writing on the subject would indicate that the use of unisex life tables in connection with pension plans would not result in equal treatment, but rather in unjustifiable discrimination. U. S. Commission on Civil Rights, Civil Rights Digest [Winter 1977, p. 45-6]."

Sincerely,

John F. Kilkenny

DOCKETE

cc:
The Honorable Richard H. Chambers
The Honorable Ben C. Duniway
Mr. Emil E. Melfi, Jr., Clerk

BEST COPY AVAILABLE

Revised: May 5, 1977

ramifications of its decision. Unless and until unisex tables are developed, an employer, to comply with the EEOC regulations on equal benefits, may not charge any additional amount to his female employees. In thus forcing the employer himself to cover the added amount necessary to assure equal benefits, this makes the employment of females economically unattractive, a result clearly at odds with the thrust of Title VII.

I would grant the petition for rehearing, set aside the judgment of the lower court and remand for a trial on the issue of whether the distinctions under the plan are mere pretexts designed to effect an invidious discrimination against the members of the female sex.[4/]

Footnote 4/ [Reference, Page 8]

For that matter, the available writing on the subject would indicate that the use of unisex life tables in connection with pension plans would not result in equal treatment, but rather in unjustifiable discrimination. U. S. Commission on Civil Rights, Civil Rights Digest [Winter 1977, p. 45-6].

APPENDIX E.

Legislative and Administrative History of Acts.

I.

The Equal Pay Act.

In enacting the Equal Pay Act, the 88th Congress specifically intended that employers might continue to classify people as "men" and "women" for compensation purposes so long as the classification involved actual or good faith differences as the basis for the differences in pay and was not a mere subterfuge to pay women less.

1. *The House.*

The House Committee noted that an employer might pay male packagers and female packagers differently where there were real and not merely nominal differences as the basis for the different pay. (109 C.R. 9196, 9209; 2/23/63.) If the male packagers were required to lift heavy boxes and the female packagers were not, more compensation might be paid to the male packagers. Previous cases have so understood the Equal Pay Act. *Shultz v. Wheaton Glass Co.*, 421 F.2d 259 (3d Cir. 1970) *cert. den.* 398 U.S. 905; *Ammons v. Zia Co.*, 448 F.2d 116 (10th Cir. 1971).

Congress also specifically intended that the employer would not be required to classify men and women in the *same* way if to do so would penalize the employer by requiring payment of more for work done by one class ("women") than for the same work done by the other ("men").

The House Committee rejected the policy of the administration's bill (109 C.R. 240, 2/21/63), which would require that all distinctions (including longev-

ity) between men and women be disregarded. It did so in two ways: (a) by narrowing the statutory prohibition; (b) by adding exceptions which were not merely "defenses" but which were "exempted from the operation of the statute", and consequently not prohibited.

The Committee Report pointed out that it was prohibiting pay differentials based *solely* on sex and not on some correlated factor. "Supplementary Views" accompanying the Committee Report also announced the rejection of the administration's broad policy. The differences in the two bills were also explained by the Committee on the House floor.[1]

The House Committee Report said in part:

> "Section 2 of the bill (H.R. 6060) amends section 6 of the Fair Labor Standards Act by adding a new subsection thereto. This subsection, in effect, declares that wage differentials based *solely* on the sex of the employee are unfair labor standard. . . . Three specific exceptions and one broad general exception are also listed. It is the intent of this committee that *any* of these exceptions shall be *exempted from the operation of this statute. As it is impossible to list each and every exception, the broad general exclusion has been also included . . .*" (Emphasis added.)

Logically, this broad general exclusion cannot mean a factor not *correlated* with "maleness"/"femaleness". A pay differential not so correlated would be entirely outside the prohibition of the Equal Pay Act in any

[1] "I think it is important that we have clear legislative history on this point. . . . The clear intention was to narrow the whole concept. We went from 'comparable' to 'equal' . . ." (109 C.R. 9197, 5/21/63.) "The burden would be on the Department of Labor to prove the exceptions are *not* true." (109 C.R. 9208, 5/23/63). (Emphasis added.)

event. Rather, the Act forbids paying women less than men where there are no actual or good faith differences; but it excludes from its prohibition pay differentials where there is a factor of difference—such as "male packagers" lifting heavy boxes, and "female packagers" not including that factor.

Thus the exempt pay differential for "any other factor other than sex" cannot mean a factor not correlated with sex—because in the example given ("male" and "female" packagers), the pay differential is correlated with a classification by sex. It is thus "based on" sex in a general sense, but there is nevertheless an "other factor other than sex" that is the basis for the pay differential. So here the factor is longevity and not sex "solely".

While the "male packagers" example might also be covered by one of the other statutory exceptions, Congress specifically intended the fourth exception to be a *broad* additional exclusion.

If, on the other hand, every factor *correlated* with sex (or "based on" sex) were a prohibited pay differential, then the broad general exclusion would have absolutely no meaning. Exception (iv) of the statute would become an "empty set" as no case would fall within it. To so interpret the exemption would turn it from a "broad general exclusion" into a legal nullity. It would be tantamount to a legislative repeal.

The foregoing conclusion is supported by explicit legislative history on the House floor. Congressman Findley offered an amendment to the bill to add an *additional* exception that would permit differences in wages if there were other costs to the employer in employing women in the same work class as men,

so as not to penalize the employer for so employing women. (109 C.R. 9217.)

This amendment was rejected on the ground that there was no necessity for an *additional* exception as the matter was already covered by exclusion four. The House Committee chairmen and members stated they wanted the legislative history to be clear. Thus, Congressman Thompson (in charge of the bill) said "the language the gentleman [Mr. Findley] would add is redundant"; "the protection the gentleman [Mr. Findley] seeks already exists in the bill. I agree with the gentleman [Mr. Goodell who wrote the bill before the House] that the legislative history should show our intention". Then in direct answer to a direct question from Congressman Pucinski, the Chairman stated that "any other factor other than sex" covered what Congressman Findley was trying to do. (109 C.R. 9217, 5/23/63.)

Thus the controlling legislative history and the explicit language of the House Committee bill (H.R. 6060) which became the law, shows that it is certainly ***not*** the intent of law to require the employer to pay men and women nominally the same amount when the actual effect would be to require the employer to pay women *more* than men for work of the same class.[2]

[2]Both houses considered longevity as a basis for adding the general exception to the Equal Pay Act. (See H.R. 6060, quoted in H.R. Rep. No. 309, 88th Cong. First Sess., 7 (1963); s.1409, quoted in S. Rep. No. 176, 88th Cong. First Sess., 4, 6 (1963). Hearings before the House and Senate in March and April of 1963 placed before Congress the higher cost of retirement benefits for women than for men, and was a factor providing impetus for the addition of the subsection (iv) exception. Hearings on H.R. 3861 and Related Bills, before the Special Sub committee on Labor of the House of Representatives, 88th Cong. 1st Sess. (1963), 103, 184-186 and 241;

2. *The Senate.*

The Senate history shows the same specific intent.

The Senate Sub-Committee (which included Senator Randolph) held hearings and substituted a bill with four exemptions for the Administration's bill. (S. 109 C.R. 2886, 2/25/63.) Senator Randolph was co-author of the Sub-Committee bill (109 C.R. 8915, 5/17/63.) The Senate Committee, in turn, struck three of the exceptions, leaving *only* the fourth—any other factor other than sex. The intent of the Committee bill was that the fourth exception included the other three. The Senate Committee Report accompanying the bill further noted that in addition to the exceptions that the Senate specifically intended to include in the single broad exclusion, it also intended to allow additional exceptions under that broad category where "an employer will be economically penalized by the elimination of a wage differential. . . ." This intent, expressed by the Senate Report, was identical to the intent of Congressman Findley's amendment which the House likewise stated was included in the fourth exemption.

The Senate passed the Senate Committee bill with only the broad fourth exclusion. The House, after adopting H.R. 6060, struck the language of the Senate bill and substituted therefor the language of H.R. 6060. When both bills were then returned to the Senate, Senator Dirksen made the point that he had spoken with those who would be conferees and "there is general agreement that the House language is quite preferable to the language contained in the Senate

Hearings on S. 882 and S. 910 before the Subcommittee on Labor of the Committee on Labor and Welfare, United States Senate, 88th Cong., 1st Sess. (1963) 142 and 145.)

bill." (109 C.R. 9762, 5/28/63.) The Senate thereupon adopted the House bill with the *four* exemptions expressly stated.

The history confirms that Congress did *not* prohibit differentiation upon the basis of sex. Pay differentiation upon the basis of sex is prohibited if, but only if, there is no other factor other than sex that is the basis for the pay differential. The burden is on the plaintiff to show there is no other factor; and here plaintiffs have conceded there is another factor—longevity.

II.
Title VII of Civil Rights Act.

The same 88th Congress which adopted the Equal Pay Act also enacted the Civil Rights Act. The original legislative proposal came from the Justice Department.

1. *House Action.* When Title VII was debated, Congressman Smith (Va.) proposed to add the word "sex" to various sections of the title (110 C.R. 2577 2/8/64). After the amendment was offered, only one serious argument was presented in its favor, first by Congresswoman Griffith and then by others. (110 C.R. 2578-80, 2/8/64). The argument was *not* that discrimination on account of sex should be legislatively treated in the same way as discrimination on account of race or color. The argument was *rather* that the addition of "sex" was necessary to ensure "color blind" application of Title VII among women in the labor market. The *absence* of the amendment, it was urged, could have a practical effect of favoring women of one race, color or religion ahead of women of another race, color or religion, in the labor market (110 C.R. 2579, 2582, 2583, 2584, 2/8/64).

The opposition to the amendment was likewise based on "the experience which the Congress had with respect to the equal pay legislation" and other experience which dictated that legislatively, discrimination on account of sex should *not* be treated in the same way as discrimination on account of race or color. (110 C.R. 2581, 2577-8, 2582).

After the amendment passed on Saturday, Congressman Goodell proposed on Monday adding "sex" as a bona fide occupational qualification. (110 C.R. 2804, 2/10/64.) The Goodell amendment was accepted without question (110 C.R. 2804) even though the House had rejected an amendment to make "race or color" a bona fide occupational qualification. (110 C.R. 2550, 2/8/64.)

Thus, the House did not intend to prohibit all classifications of employees as "male"/"female" (e.g., women nurses to care for women. [110 C.R. 2718, 2/10/64].)

2. *Senate Action.* When the House bill (H.R. 7152) reached the Senate, extensive debate centered on whether the bill should be referred to the Senate Committee already conducting hearings on the Justice Department bill (110 C.R. 3715, 2/26/64). Both Senators Dirksen and Morse favored such referral. One of the major concerns was to establish clear legislative history. (110 C.R. 2884, 3715, 6445-6451).

Extensive debates focused on questions and objections to the House bill, even before the bill was made the pending business. Senator Dirksen introduced a memorandum of objections regarding matters as to which clear legislative intent was desirable. (110 C.R. 3715, 3719, 4754, 6417, 6450, 6455).

The Senate determined to consider the bill on the floor instead of referring to a regular committee (110 C.R. 3719, 4754, 6417, 6455). Four major results followed.

First, Senator Humphrey (floor manager of the entire House bill), Senator Dirksen, and others, formed an *ad hoc* committee to consider the views of all Senators and prepare a substitute bill. The Dirksen-Humphrey, et al., substitute bill was later introduced. It was first introduced as Amendment No. 656, and later as Amendment No. 1052. (110 C.R. 12706-7, 12807, 12817, 12831, 12817, 11926, 11935).

Second, Senators Clark and Case in charge of Title VII of the House bill prepared and introduced interpretive memoranda declaring the intent of that Title. (110 C.R. 7203-59). Additionally, analyses were prepared under the direction of Senator Humphrey *et al.,* distributed to all Senators, and printed in the Record (110 C.R. 7474, 9105, 14464).

One of Senator Dirksen's objections and Senator Clark's explanation of the intent of the House bill dealt directly with the instant case.

> "Objection: The sex antidiscrimination provisions of the bill duplicate the coverage of the Equal Pay Act of 1963. But more than this, they extend far beyond the scope and coverage of the Equal Pay Act. They do not include the limitations in that act with respect to equal work on jobs requiring equal skills in the same establishments, and thus, cut across different jobs.
>
> "Answer: The Equal Pay Act is a part of the wage hour law, with different coverage and with numerous exemptions unlike title VII. Furthermore, under title VII, jobs can no longer be classified as to sex, *except where there is a rational basis for discrimination,* on the ground of bona fide occupational qualification. *The standards in the Equal Pay Act for determining discrimination as to wages, of course, are applicable to the comparable situation under title VII.*" (110 C.R. 7217) (Emphasis added).

Thus Congress did not intend to outlaw rational differentiation, although the District Court herein held to the contrary.

Third, just before Senators Dirksen and Humphrey introduced their substitute No. 1052, Senator Dirksen yielded the floor to Senator Bennett who introduced his amendment, (No. 1051) regarding the Equal Pay Act.

Procedurally, the Bennett amendment (No. 1051) was proposed to the House bill H.R. 7152. Introducing it *before* the Dirksen-Humphrey amendment (No. 1052) permitted both Senators Dirksen and Humphrey to expressly accept the Bennett amendment as an amendment to *their* bill (No. 1052) and to explain the reason for adding it to their proposal No. 1052. And that is precisely what they did. Both Senators Dirksen and Humphrey explained that the amendment was necessary in order to carry the exemptions of the Equal Pay Act into the Title VII. (110 C.R. 13310, 13647.)

Fourth, as if that were not enough, after the text of No. 1052 as amended by the Bennett amendment was substituted for the House bill (H.R. 7152) and made the bill pending before the Senate, Senator Randolph (co-author of an equal pay bill) asked Senator

Humphrey, manager of the bill on the floor, "a clarifying question" as to the effect of the pending bill on pension plans which differentiate between men and women.

> "Mr. RANDOLPH. Mr. President, I wish to ask of the Senator from Minnesota (Mr. Humphrey), who is *the effective manager of the pending bill,* a clarifying question on the provisions of title VII.
>
> "I have in mind that the social security system, in certain respects, treats men and women differently. For example, widows' benefits are paid automatically; but a widower qualifies only if he is disabled or if he was actually supported by his deceased wife. Also, the wife of a retired employee entitled to social security receives an additional old age benefit; but the husband of such an employee does not. These differences in treatment as I recall, are of long standing.
>
> "*Am I correct, I ask the Senator from Minnesota, in assuming that similar differences of treatment in industrial benefits plans, including earlier retirement options for women may continue in operation under this bill, if it becomes law?*
>
> "Mr. HUMPHREY: *Yes. That point was made unmistakably clear earlier today by the adoption of the Bennett amendment,* so there can be no doubt about it.
>
> "Mr. RANDOLPH. I am grateful for the reply." (110 Cong. Rec. 13663-4, 6/12/74) (Emphasis added).

The Senate, and especially Senator Humphrey was vitally aware of the need to make a legislative record as it did. (110 CR 4858.)

There can be no question that the intent of the Senate was not to prohibit differentiation or classification by sex for purposes of compensation and benefit plans.

3. *House Action.* When the Dirksen-Humphrey bill was passed by the Senate and returned to the House, this point was also made clear in the presentation to the House.

> "The Senate amendment also— . . .
>
> "Second. Provides that compliance with the Fair Labor Standards Act as amended satisfies the requirement of the title barring discrimination because of sex—section 703(b): . . ." (110 C.R. 15896, 7/2/64].

III.

Administrative Authority and Interpretations.

The question of the Courts' responsibility and the legal effect to be given administrative interpretations of the statutes was a matter carefully considered by the 88th Congress, both in regard to the Equal Pay Act, and in regard to Title VII.

Legislative intent is shown by what the Legislature *rejected* as well as by what it adopted. This point is important where, as here, the administration introduces a bill which Congress rejects, and the administration then asks the courts to give effect to the law enacted *as if* the Administration's bill had been enacted, when in fact Congress rejected it. As far as the Administration is concerned, such a practice would seem to exceed the Constitutional duty "to take care that the laws be faithfully executed." (Art. II.)

1. Equal Pay Act. In enacting an equal pay bill, the controlling House Committee Report, and the de-

bates on the House floor show that Congress specifically rejected a proposal to give the administration any quasi-legislative authority. Congress established the Secretary of Labor as a prosecutor, and recognized that as such he had inherent authority to state his position. But his bulletins could only be used in Court as a shield for the defendant, not as a policy-making sword, either as to matters of law or as to matters of fact. It was entitled to weight only in defendant's favor.

The administrator could give "guidance" to those being regulated, but could not give "guidance" to the courts *against* defendant.

The Supplementary Views to the Committee Report stated in part:

> "Since this bill now before the House differs substantially from either last year's proposals or this year's administration bill, we feel that these changes should be pointed out. The following are the major differences between the bill reported by the full Education and Labor Committee and the earlier administration proposal. Under the committee bill:
>
> . . .
>
> "4. Enforcement must be obtained in the Federal Courts and not arbitrarily through an all-powerful administrative body.
>
> . . .
>
> "11. The Secretary of Labor is not given broad regulatory and rule making authority. ['There would be no new regulations' 109 CR 9203.] . . ." House Report No. 309, 5/20/63; U.S. Code, Cong., and Adm. News pp. 689-90; 109 C.R. 9209 *et seq*.

The debates on the House floor showed the same intent:

> "With reference to regulations, we have talked a great deal about this. It is an oversimplification but, generally speaking, *we have three different types of guidance that can be offered by the Administrators to those who are being regulated.* One of them is legislative regulation. . . .
>
> "That was in the original proposal this year and it was in the proposal last year, granting legislative regulatory authority. It is out of this bill. We also knocked out the right of the Secretary of Labor *even to issue interpretative regulations.*
>
> "*I emphasize that interpretative regulations are also barred.* . . . [italics added]
>
> ". . . The Secretary, in my opinion has the inherent authority to write interpretative bulletins. All this amounts to is *telling the public* the Secretary's interpretation of the law for the guidance of those who are to be regulated. *Such bulletins have no standing in court*, but they are there as a guidance to the court as to what the view of the administrator *was. They have no other significance, except that if an employer relies on this interpretative bulletin, he is protected.* He is not in violation if he has done something in reliance upon those interpretative bulletins . . ." (109 C.R. 9208-9209; 5/23/63.) (Emphasis added.)
>
> ". . . The Secretary may believe that a violation exists but the court *will make a second independent judgment*. This is very significant . . . (italics added)

"MR. THOMPSON of New Jersey. Indeed, we are not granting any such authority, but the fact is that we are specifically and categorically restricting it, so that this is a negative action rather than a positive one." (109 C.R. 9198; 5/23/63.)

"Eighth, It is not intended that the Secretary of Labor or the courts will substitute their judgment for the judgment of the employer and his experts who have established and applied a bona fide job rating system." (109 C.R. 9209; 5/23/63.)

2. Title VII. The House Committee adopted the Justice Department civil rights bill with a minimum of debate. However, the House Committee proposed a number of *clarifying* amendments on the House floor. One of these was to insert the word "*procedural*" regulations to make clear that the EEOC had *no* authority as to interpreting *substantive* law. (110 C.R. 2575.) The amendment was added "to make more definite the limitation on his powers". A second was to insert the requirement that there must be "reasonable cause" before the EEOC brings suit. The purpose was "to protect us from an errant and arrogant bureaucracy. . . ." (110 C.R. 2563.) Even as to procedural regulations, public hearing is required. (110 C.R. 2573.)

Under the House bill the EEOC was a prosecutor, just as is the Secretary under the Equal Pay Act. As such the EEOC had inherent authority to announce its position, but the intent of Congress was that the courts exercise their judgment, *independent* of the administrator.

When the bill reached the Senate, the Senate further narrowed EEOC authority.

After Title VII was adopted however, the EEOC, for the considered purpose of creating an erroneous *impression* that the EEOC had authority to interpret the law, and in the expectation that "busy federal judges" would defer to such interpretations, the EEOC "adopted 'guidelines' (since it has no substantive rule-making power)" (Blumrosen, *infra* at 698). It issues such "guidelines" without any public hearing. Further, for the purpose of developing decisional "law", the EEOC decided to give the "reasonable cause" provision the appearance of a quasi-judicial decision (Blumrosen, *infra* at 733). These efforts are extensively described by one of the architects of this EEOC policy, in Blumrosen, "Administrative Creativity: The First Year of the Equal Employment Opportunity Commission, 38 Geo. Wash. L.Rev. 694 (1970) (Compare Constitution Art. II, §3 which provides that the executive "shall take care that the laws be *faithfully* executed").

The result of giving effect to such EEOC pronouncements is that any defendant is denied the independent impartial decision of the judiciary guaranteed by the Constitution and the statutes. While Congress has the *authority* to delegate quasi-legislative and quasi-judicial authority to an administrative agency, yet when Congress has not *exercised* that authority, it is a deprivation of defendant's constitutional and statutory rights for the courts to treat the agency as if such power *had* been delegated to the agency. A defendant is entitled to an impartial, independent, *de novo* decision of the Courts.

IV.
1972 Congressional Action.

In 1972 Congress considered and rejected proposals to broaden Title VII. In rejecting such proposals, it expressly reaffirmed major points of its 1964 action.

In the House, the Committee Report (majority) reflects the original broad legislative proposal. However the House *rejected* that proposal, and adopted a bill proposed by the minority.

Therefore the House Committee Report represents the views Congress *rejected.*

In the Senate, the Committee made major modification in the bill before reporting it to the Senate. Additional major modifications were made on the Senate floor.

The 1972 action is important for three reasons.

First, Congress reaffirmed that *only* those adverse actions that are statutorily defined as unlawful employment practices constitute unlawful discrimination under Title VII. In so doing, Congress rejected proposals to redefine discrimination in terms of "systems and effects" (House Committee Report, U.S. Code, Cong. & Adm. News, 1972, pp. 2143-44, 2150-52).

Second, Congress rejected proposals to give the administrative agency any legal authority to develop a new definition of discrimination, or to exercise *any* quasi-legislative or quasi judicial authority.

Congress again expressly recognized the predilection of the EEOC *not* to follow the will of Congress, and accordingly granted the EEOC an *expressly* partisan position (to bring suit) and *rejected* proposals to give it authority to interpret law or find ultimate facts.

The reason for this action was summed up by the House Committee minority report by members including Congressman Erlenborn, whose substitute bill was adopted by the House. They said in part:

> "We contend that the EEOC has attained an image as an advocate of civil rights, and properly so. For this very reason, we submit that it cannot be an impartial arbiter of the law. An advocate, by nature, represents one side of an issue. How can he then be asked to apply the law without prejudice?" (U.S. Code, Cong. & Adm. News, 1972, p. 2168.)

The floor debates are likewise replete with expressions of concern over bias[3] of the EEOC. (118 C.R. 731, 594, 699, 701.)

Accordingly Congress determined not to give the agency any law-making authority. The Courts are to impartially determine the law. Hence undue deference to the administration gives the agency authority Congress intended it *not* have and not exercise. It also abdicates the courts' responsibility which Congress intended the courts exercise.

Moreover, since the EEOC has been determined by Congress to be an advocate and *not* an impartial administrator, deference to such agency deprives defendants of an *impartial* determination required by the 14th Amendment.

The Congressional decision not to expand the definition of discrimination and to limit the Court's jurisdic-

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[3]For example, Senator Saxbe said in part, "However, too often we would find—and I speak as a former attorney general who handled the legal aspects of this matter—that in their zealousness to try to protect the civil rights of some people, they were also eager to violate the civil rights of others." (118 C.R. 731; 1/21/72).

tion to the statutory definition of unlawful action is also clear. The original legislative proposal was rejected and the final result of the Congressional action is clearly reflected in the Conference report. It states:

> "1. The Senate amendment required a finding that the respondent engaged in an unlawful employment practice and the House bill required a finding that respondent 'intentionally' engaged in such unlawful employment practice.
>
> . . .
>
> "4. The House bill restated the provisions of existing law prohibiting court ordered remedies based on any adverse action except unlawful employment practices prohibited under Title VII.
>
> . . .
>
> "The Senate receded with an amendment that provides the following:
>
> "1. A finding that the respondent has intentionally engaged or is intentionally engaging in an unlawful employment practice, as the language of the current law reads.
>
> . . .
>
> "4. The provisions of existing law prohibiting court ordered remedies based on any adverse action except unlawful employment practices under Title VII are retained." (Conference Report, U.S. Cong. & Adm. News (1972) v. 2, p. 2183.)

This action by the Congress in 1972 explicitly reaffirmed the action in 1964.

In 1964, the original legislative proposal permitted the courts to apply remedies unless the action of the employer had been "for cause." This implied a very broad authority in the Courts; and that the burden was on the employer to show that the "failure to hire" etc. was for cause.

The House Committee changed the language on the House floor to make clear that actions by the employer "for any reason other" than the prohibited five reasons were *not* unlawful and it is outside the jurisdiction of the court to order remedies unless the employer's was for a prohibited reason. (110 C.R. 2566, 2/8/64.)

When the bill reached the Senate, the Senate added the word "intentional" as a clarifying change. (110 C.R. 12723-4.) Again, as in the House, the view of the *proponents* of the bill was that discrimination was action for a reason and that unlawful discrimination was action for one of the five reasons stated by the statute.[4]

Accordingly the word "intentional" clarified that meaning; but also precluded judicial expansion of the definition.

By reaffirming those jurisdictional limitations, Congress reaffirmed the statutory limits in 1972.

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[4]The proponents of the legislation repeatedly pointed out that the word "discrimination" (in an unlawful sense) had a settled legal meaning, as it was used in F.E.P.C. statutes in about half the States, as well as in the National Labor Relations Act, the Interstate Commerce Act, and the Federal Aviation Act. See, e.g. 110 Cong. Rec. 6549, 7218, 5803-4, 5437, 7477.

V.
Legislative Intent vs. Interpretive Bulletin in Employer Costs.

The Legislative history flatly contradicts the interpretive bulletin relied on by the Court of Appeals on rehearing (D-3).

For example, the Senate report recognized *additional* exceptions for wage differentials based on other costs. It said:

> "It is the intention of the committee that where it can be shown that on the basis of all of the elements of the employment costs of both men and women, an employer will be economically penalized by the elimination of a wage differential, the Secretary can permit an exception *similar to those he can permit for a bona fide seniority system or other exception mentioned above.*" (109 C.R. 8915.)

The agency's interpretation says exceptions on a cost basis would be "contrary to law" because it is unlawful to differentiate upon the basis of sex. Isn't the Memorandum therefore *ultra vires*? It says:

> "To group employees solely on the basis of sex for purposes of comparison of costs necessarily rests on the assumption that the sex factor alone may justify the wage differential—an assumption plainly contrary to the terms and purpose of the Equal Pay Act."

Obviously the latter bulletin is not a faithful, or logical, interpretation of a statute which says:

> "It shall *not* be an unlawful employment practice . . . for an employer *to differentiate upon the basis of sex* in determining the amount of the wages or compensation paid or to be paid to employees of such employer. . . ."

APPENDIX F.

Charter Sections 220.1(1)(a) and (g).

Sec. 220.1. The Department of Water and Power shall also have the power and duty:

(1) To establish and maintain within said Department a general plan and system of retirement, disability, and death benefits, and, in cooperation with its eligible and participating employees, to provide currently out of the Water Revenue Fund and the Power Revenue Fund a portion of the cost under said plan and system, including expenses incident to the administration thereof, subject, however, to the following provisions, to-wit:

(a) That such plan and system shall be maintained in accordance with sound business practices and recognized actuarial methods, and the respective contributions of said employees and said Department, whether prescribed by present or future provisions of said plan and system, may be modified or adjusted, subject to the direction and approval of the Board of Water and Power Commissioners, whenever the Board of Administration, as hereinafter designated, shall find that said business practices or said actuarial methods require such modification or adjustment;

* * *

(g) That such Board of Administration shall at regular intervals, each not exceeding a period of five years, secure a general survey and actuarial report of said plan and system, and said Board, subject to

the direction and approval of the Board of Water and Power Commissioners, shall from time to time amend said plan and system in such manner as may be found to be advisable to meet changed conditions, or, as in the light of experience, may be considered necessary;

* * *